SUPPLEMENTARY RETURN

TO THE

HOUSE OF COMMONS

CONTAINING

FACTUM OF CASE, BARRETT VS. CITY OF WINNIPEG

IN CONNECTION WITH THE

ABOLITION OF SEPARATE SCHOOLS

IN THE

PROVINCE OF MANITOBA.

PRINTED BY ORDER OF PARLIAMENT.

OTTAWA:
PRINTED BY BROWN CHAMBERLIN, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1891

SUPPLEMENTARY RETURN

(63*b*)

To an ADDRESS of the HOUSE OF COMMONS, dated the 5th of May, 1891;—For copies of all correspondence, petitions, memorials, briefs, and factums, and of any other documents submitted to the privy council in connection with the abolition of separate schools in the province of Manitoba by the legislature of that province; also copies of reports to and orders in council thereon; also copies of any Act or Acts of said legislature abolishing said separate schools or modifying in any way the system existing prior to 1890.

By order.

J. A. CHAPLEAU,
Secretary of State.

WINNIPEG, MANITOBA, 15th April, 1891.

SIR,—I have the honour to forward to you by this day's mail for your information a copy of the Appeal Book of Barrett vs. the City of Winnipeg.

I have, etc.,

JOHN K. BARRETT.

To the Hon. the Secretary of State, Ottawa, Canada.

INDEX.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER OF BY-LAWS 480 AND 483 OF THE CITY OF WINNIPEG.

APPLICATION OF JOHN KELLY BARRETT TO TEST THE MANITOBA PUBLIC SCHOOLS ACT OF 1890.

In the Queen's Bench.

In the matter of an application to quash By-law 480 and 483 of the city of Winnipeg.

I, John Kelly Barrett, of the city of Winnipeg, in the county of Selkirk and province of Manitoba, gentleman, make oath and say:

1. That I am a rate-payer and resident of the city of Winnipeg aforesaid and have resided in the said city continuously for the past five years, and am a member of the Roman catholic church.

2. On and prior to the thirtieth day of April last a school district (having some years before been established) existed in the city of Winnipeg, and such school district was under the direction and management of the corporation known as "The School Trustees for the Catholic School District for Winnipeg No. 1, in the Province of Manitoba."

3. The said corporation has established and in operation a number of schools in Winnipeg, under the provisions of the various provincial statutes relating to schools, to one of which, namely, St. Mary's school, situate on Hargrave Street, I have for three years past, sent my children for instruction, which children are aged respectively ten, eight and five years.

4. That the said St. Mary's school is still in existence and the same teaching and religious exercises are continued as before the passing of the said act and my said children still attend said school.

5. The paper writing now shown to me marked with the letter "A" is a true copy of by-law no. 480, passed by the council of the city of Winnipeg, on the fourteenth day of July last, and the same is certified under the hand of the clerk of the said city and under the corporate seal thereof.

6. The said paper writing so certified as aforesaid was received by me from said clerk.

7. The paper writing now shown to me marked with the letter "B" is a true copy of by-law no. 483 passed by the council of the city of Winnipeg on the twenty-eighth day of July last and certified under the hand of the clerk of the said city and under the corporate seal thereof, and such paper writing was received by me from the said clerk.

8. I am interested in the said by-law by virtue of being a resident and rate-payer of said city.

9. The paper writing now shown to me marked with the letter "C" is a true copy of a requisition sent to the clerk of the said city by the school trustees for the protestant school district of Winnipeg, no. 1, on the twenty-eighth day of April last.

10. The paper writing now shown to me marked with the letter "D" is a true copy of the requisition sent to the clerk of the said city by the school trustees for the

catholic school district of Winnipeg, no. 1, in the province of Manitoba, on the twenty-ninth day of April last.

11. That the estimate of all sums for the lawful purposes of the city of Winnipeg for the present year as required to be made by section 283 of the municipal act passed in the fifty-third year of the reign of her majesty Queen Victoria, chapter 31, were based upon the two requisitions above referred to, copies of which are marked with the letters "C" and "D" as aforesaid, which requisitions were presented to the council of said city of the fifth day of May last.

12. That the amounts of $75,000 and $2,550, mentioned in the said exhibits "C" and "D," respectively, form part of the sum $377,744.43 mentioned in said exhibit "A."

13. The effect of the said by-laws is that one rate is levied upon all protestants and Roman catholic rate-payers in order to raise the amount mentioned in said exhibits "C" and "D," and the result to individual rate-payers is, that each protestant will have to pay less than if he were assessed for protestant schools alone, and each Roman catholic will have to pay more than if he were assessed for Roman catholic schools alone.

14. I have read the affidavit sworn to in this matter on the third day of October instant, by the Most Reverend Alexander Taché, and I say that so far as the same lies within my personal knowledge the same is true; as to the rest, I believe the same to be true.

JOHN K. BARRET.

Sworn before me, at the city of Winnipeg, in the county of Selkirk, this eighth day of October, A.D. 1890.

HORACE E. CRAWFORD,
A Commissioner in O. B., etc.

In the Queen's Bench.

In the matter of an application to quash by-law 480 and 483 of the city of Winnipeg.

I, Alexander Taché, of the town of St. Boniface in the county of Selkirk and province of Manitoba, archbishop of the Roman catholic ecclesiastical province of St. Boniface, make oath and say:

1. That I have been a resident continuously of this county since eighteen hundred and forty-five as a priest in the Roman catholic church, and as bishop thereof since the year eighteen hundred and fifty, and now am the archbishop and metropolitan of the said church, and I am personally aware of the truth of the matters herein alleged.

2. Prior to the passage of the act of the dominion of Canada passed in the thirty-third year of the reign of her majesty Queen Victoria, chapter three, known as the Manitoba act and prior to the order in council issued in pursuance thereof, there existed in the territory now constituting the province of Manitoba a number of effective schools for children.

3. These schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, and others by various protestant denominations.

4. The means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church, contributed by its members.

5. During the period referred to, Roman catholics had no interest in or control over the schools of the protestant denominations and the members of the protestant denominations had no interest in or control over the schools of Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic

church supported the schools of their own church for the benefit of Roman catholic children and were not under obligation to, and did not contribute to the support of any other schools.

6. In the matter of education, therefore, during the period referred to, Roman catholics were as a matter of custom and practice separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth.

7. Roman catholic schools have always formed an integral part of the work of the Roman catholic church. That church has always considered the education of the children of Roman catholic parents as coming peculiarly within its jurisdiction. The school in the view of the Roman catholics is in a large measure the "Children's Church" and wholly incomplete and largely abortive if religious exercises be excluded from it. The church has always insisted upon its children receiving their education in schools conducted under the supervision of the church, and upon them being trained in the doctrines and faith of the church. In education the Roman catholic church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspects as possibly detrimental and not beneficial to children. With this regard the church requires that all teachers of children shall not only be members of the church, but shall be thoroughly imbued with its principles and faith, shall recognize its spiritual authority and conform to its directions. It also requires that such books be used in the schools, with regard to certain subjects as shall combine religious instruction with those subjects, and this applies peculiarly to all history and philosophy.

8. The church regards the schools provided for by "The Public Schools Act" and being chapter 38 of the statutes passed in the reign of her majesty Queen Victoria, in the fifty-third year of her reign, as unfit for the purpose of educating their children, and the children of Roman catholic parents will not attend such schools. Rather than countenance such schools, Roman catholics will revert to the system of operation previous to the Manitoba act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned.

9 Protestants are satisfied with the system of education provided for by the said act, "The Public Schools Act," and are perfectly willing to send their children to the schools established and provided for by the said act. Such schools are in fact similar in all respects to the schools maintained by the protestants under the legislation in force immediately prior to the passage of the said act. The main and fundamental difference between protestants and catholics, with reference to education, is that while many protestants would like education to be of a more distinctly religious character than that provided for by the said act, yet they are content with that which is so provided and have no conscientious scruples against such a system; the catholics on the other hand insist and have always insisted upon education being thoroughly permeated with religion and religious aspects. That causes and effects in science, history, philosophy and aught else should be constantly attributed to the Deity and not taught merely as causes and effects.

10. The effect of "The Public Schools Act" will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of a school and to supply in this manner, education to children free of charge to them or their parents further than their share, in common with other members of the community of the amounts levied under and by virtue of the provisions contained in the act.

11. In case Roman catholics revert to the system in operation previous to the Manitoba act, they will be brought in direct competition with the said public schools, owing to the fact that the public schools will be maintained at public expense, and the Roman catholic schools by school fees and private subscription, the latter will labour under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools equal to those afforded by public schools, although they would be perfectly able to compete with any or all schools unaided by law-enforced support.

12. When in the foregoing paragraphs I speak of the faith or belief of the Roman catholic church, I speak not only for myself and the church in its corporate capacity, but for its members.

ALEX. TACHÉ,
Archbishop of St. Boniface, O.M.I.

Sworn before me at the city of Winnipeg, in the county of Selkirk, this third day of October, A.D. 1890.

EDMOND TRUDEL,
A Commissioner in B.R., etc.

BY-LAW No. 480.

A by-law to authorize an assessment for city and school purposes in the city of Winnipeg for the current municipal year 1890.

Whereas it is expedient and necessary for the city purposes to raise the sum of three hundred and seventy thousand seven hundred and forty-four 43.100 dollars for interest on debentures and ordinary current municipal and school expenditure for the current year by a tax on all real and personal property appearing on the assessment rolls of the city of Winnipeg for the year 1890;

And whereas the amount of the whole of the rateable property of the city of Winnipeg, as shown by the last revised assessment rolls of the said city of Winnipeg, is eighteen millions six hundred and twelve thousand four hundred and ten dollars ($18,612,410.00), and it will require a rate of two cents on the dollar on the amount of the said rateable property to raise the sum so required as aforesaid for interest on debentures now accruing due, and for the ordinary current municipal and school expenditure for the year A.D. 1890;

Therefore, the council of the city of Winnipeg in council assembled enacts as follows:

1. There shall be raised, levied or collected a tax of two cents on the dollar upon the whole assessed value of the real and personal property in the city of Winnipeg, according to the last revised assessment rolls for the year 1890, to provide for the payment of the interest on debentures now accruing due, and for the ordinary current municipal expenditure and for the schools of the city for the year A.D. 1890.

2. The sum of two dollars ($2.00) poll tax shall be levied and collected from every person residing within the city of Winnipeg, and being of the age of twenty-one years and upwards, who has not been assessed upon the assessment rolls of the city of Winnipeg, or whose taxes do not amount to two dollars, in which latter case a total tax of two dollars only shall be levied, which taxes shall be collected in the same manner as other taxes.

The taxes and rates hereby imposed shall be considered to have been imposed and to be due on and from the first day of October, A.D. 1890. Done and passed in council assembled at the city of Winnipeg, this fourteenth day of July, A.D. 1890.

ALEX. BLACK, Ald.,
Acting Mayor.

C. J. BROWN, *City Clerk.*

I hereby certify that I have compared the above, consisting of two pages of writing, with the original by-law no. 480, of the city of Winnipeg, and that the same is a true and correct copy of such by-law no. 480 of the city of Winnipeg.

Dated this 18th September, A.D. 1890.

C. J. BROWN, *City Clerk.*

BY-LAW No. 483.

A by-law to amend by-law no. 480, of the city of Winnipeg.

Whereas it has been deemed expedient and necessary to amend by-law No. 480, of the city of Winnipeg, being a by-law to authorize an assessment for city and school purposes in the city of Winnipeg, for the current municipal year, A.D. 1890;

And whereas the property of certain corporations is exempt for a period of years from ordinary municipal taxation and liable only for school rates; and it is therefore desirable to distinguish the rates providing for the city schools but so that the total several rates shall not exceed two cents on the dollar.

Now therefore, the mayor and council of the city of Winnipeg in council assembled enact as follows:

1. By-Law no. 480, entitled a by-law to authorize an assessment for city and school purposes in the city of Winnipeg for the current municipal year, 1890, is hereby amended.

(A.) By adding to the second or last recital the words following: "Whereof the rate of fifteen 4-5ths mills on the dollar shall be for interest on debentures now accruing due and for the ordinary current municipal expenditure, and the rate of four and one-fifth mills on the dollar shall be for school expenditure for the year 1890."

(B.) And by inserting after the figures "1890" in the fifth line of the first section of said by-law, the words following: "Of which the amount of fifteen and four-fifth mills on the dollar shall be."

(C.) And by inserting after the word "and" in the seventh line of said first section the words following: "And four and one-fifth mills on the dollar."

Done and passed in council assembled at the city of Winnipeg, this twenty-eighth day of July, 1890.

ALEX. BLACK, ALD.,
Acting Mayor.
C. J. BROWN, *City Clerk.*

I hereby certify that I have compared the above, consisting of two pages of writing, with the original by-law no. 483 of the city of Winnipeg, and that the same is a true and correct copy of such by-law no. 483 of the city of Winnipeg.

Dated this 18th September, A.D 1890.

C. J BROWN, *City Clerk.*

I, Charles James Brown, of the city of Winnipeg, in the county of Selkirk and province of Manitoba, city clerk for Winnipeg aforesaid, do hereby certify;

That the estimate of all the sums required for the purposes of the city of Winnipeg for the fiscal year ending the thirtieth day of April, A.D. 1891, were duly submitted to, and approved by the council of the said city.

That according to such estimates, the only amounts provided for school purposes were as follows:

The Winnipeg protestant schools	$75 000
The Winnipeg catholic schools	2 550

That such estimates for school purposes were based upon two requisitions which were received by me as clerk and were presented to the said council on the fifth day of May, A.D. 1890, and which were respectively in the words and figures following to wit:

"PROTESTANT SCHOOL BOARD OF THE CITY OF WINNIPEG,
"OFFICES CITY HALL, WINNIPEG, April 28th, 1890.

P. C. MCINTYRE, Chairman,
STEWART MULVEY, Sec.-Treas.

"SIR,—I am directed by the board of school trustees for the protestant school district of Winnipeg no. 1 in the province of Manitoba, to ask the municipal council of the city of Winnipeg, to levy and collect for school purposes, a sum of seventy-five ($75,000)

thousand dollars for the school year of 1890. Herewith please find a list of names with their respective assessment, liable to be assessed for support of protestant schools."

"Your obedient servant,
STEWART MULVEY, *Sec.-Treasurer*

C. J. BROWN, CITY CLERK, &c., &c."

"BOARD OF CATHOLIC SCHOOL TRUSTEES, WINNIPEG, April 29th, 1890

"To CHAS. BROWN, ESQ., City Clerk, City.

"SIR,—I am instructed by the school trustees of the Winnipeg catholic school district, to provide you, and I transmit herewith, their estimate for the sums required to be levied for the support of their schools by taxation for the year 1890, exclusive of the taxes on corporate bodies. I also transmit list of names of persons liable to be assessed for the same. I am to request that you will submit said estimate and list to the mayor and aldermen in council, of the city of Winnipeg, for levy and collection by them in compliance with subsection (d) of section 17, of the school amendment act, 1885.

"I am, &c.,
"GEO. E. FORTIN, *Sec.-Treasurer.*

"Extract from the minutes of a meeting of the school trustees for the catholic school district of Winnipeg, no. 1, held at the city of Winnipeg, on the twenty-ninth day of April, A.D. 1890.

"Present: Messrs. N. Bawlf, chairman, J. K. Barrett, John O'Connor, D. B. McIlroy and M. McManus.

"It was moved by Mr. J. K. Barrett, seconded by Mr. McManus, that to supplement the government grant in aid of the schools of this district, the sum of two thousand five hundred and fifty dollars ($2,550) be levied by taxation upon catholic ratepayers of the catholic school district of the city of Winnipeg, for the year eighteen hundred and ninety (1890), exclusive of the taxes to be levied upon the corporate bodies, and that the secretary-treasurer forward the said estimate with a list of the Catholic ratepayers liable to be assessed therefore to the city of Winnipeg, on or before the 30th day of April, instant.—Carried. "A true copy.

(Corporate seal) "GEO. E. FORTIN.
"*Secretary-Treasurer, S. T., for the C. S. D. Winnipeg.*"

Dated this eighteenth day of September, A.D. 1890.

C. J. BROWN, *City Clerk.*

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

Upon the application of John Kelly Barrett, a resident ratepayer of the said city of Winnipeg, and upon hearing read copies of the said by-laws, certified under the hand of the clerk of the said city and under the corporate seal of the said city and also the affidavits of the said John Kelly Barrett and the Most Reverend Alexander Taché, and upon hearing the attorney for the said applicant let the attorney for the corporation of the city of Winnipeg attend before the presiding judge in chambers, at the court house in the city of Winnipeg, at the hour of half-past ten o'clock in the forenoon of the twentieth day of October, instant, and shew cause why an order should not be made by the said judge quashing the said by-laws for illegality, and that upon the following among other grounds;

1. That because by the said by-laws the amounts to be levied for school purposes for the protestant and catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum.

T. W. TAYLOR, *Chief Justice.*

Dated in Chambers, the 7th day of October, 1890.

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

I, George Bryce, of the city of Winnipeg, in the county of Selkirk, in the province of Manitoba, professor in Manitoba college, make oath and say:

1. That I have been a resident of the province of Manitoba since the year 1871. That I am the minister of the presbyterian church longest resident in the province, that I have been in constant communication with the officers and councils of the church, having been the first moderator of the synod of Manitoba and the North-West Territories of the presbyterian church in Canada, and I am personally aware of the truth of the matters herein alleged.

2. That I am familiar with opinions of the presbyterians of the province, in the years immediately succeeding the entrance of Manitoba into confederation in 1870, and am aware that the presbyterians of this province did not claim to have the church schools, which has been previously voluntarily maintained by them or by the church for them continued to them at cost to the general public.

3. That in founding Manitoba college, in November, 1881, I took over the highest class of Kildonan school as the beginning of the college, which had thus far continued a purely church institution, and for which I never heard the claim advanced that we were entitled to any consideration under the Manitoba act, indeed I always considered the government schools as entirely different and, up to 1871, unknown in the country, and for several years we did take younger students into our church college who might have been educated in the government schools alongside.

4. That about the year 1876 a strong agitation took place in the Province to have one public school system established, but this agitation failed to obtain effect in legislation.

5 The presbyterian synod of Manitoba and the North-West Territories which represents the largest religious body in Manitoba, passed in May, 1890, a resolution heartily approving of the public school act of this year, and I believe that it is approved of by the great majority of the presbyterians of Manitoba.

6. That the presbyterian church is most solicitous for the religious education of all its children. It takes great care in the vows required of parents at the baptism of their children, and in urging its ministers to teach from the pulpit the duty of giving moral and religious training in the family It is most energetic in maintaining efficient sunday schools, which have been called the "Children's Church," and in requiring the attendance of the children at the church services, which is made a great means of instruction I think it is our firm belief that this system joined with the public school system has produced and will produce a moral, religious and intelligent people.

7. That the presbyterians are thus able to unite with their fellow christians of other churches in having taught in the public schools (which they desire to be taught by christian teachers) the subjects of a secular education, and I cannot see that there should be any conscientious objection on the part of the Roman catholics to attend such schools, provided adequate means be provided of giving elsewhere such moral and religious training as may be desired; but on the other hand there should be many social and national advantages.

8. I believe all presbyterians are anxious to have science, history and philosophy taught in such a manner as will intelligently recognize the divine purpose and influence in human affairs, but certainly I cannot desire to teach, as would be covered by the plea sometimes advanced that the instrumentality of evil and the deeds of bad men should be "constantly attributed to the deity," nor do I believe the tendency of the public school as established in Manitoba at present to be toward any atheistic or irreligious goal, but that it will follow the current opinions of the settlers of Manitoba, a remarkably large number of whom are religious and intelligent.

9. That instead of it being a detriment that public schools will be "established in every part of Manitoba where the population is sufficient for the purpose of a school" it will be a benefit, as up to the present time large numbers of Roman catholic children

scattered through the general population have been able to get no education, and are in danger of growing up an illiterate class.

10. That when in the foregoing paragraphs I speak of the belief of presbyterians, I speak simply of what I consider their belief to be, and I speak only for myself, as it is a privilege for every presbyterian to think for himself, and to be directly responsible to God, and in my opinion the general feeling of what are known as the protestant denominations is as I have indicated above.

GEORGE BRYCE.

Sworn before me at the city of Winnipeg, in the county of Selkirk, this 22nd day of October, A.D., 1890.

A. E. RICHARDS, *A Commissioner in B. R., etc.*

In the Queen's Bench

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

I, Wm. Hespeler, of the county of Selkirk in the province of Manitoba, financial agent, make oath and say :

1. That for the last seventeen years I have been a resident in the province of Manitoba.

2. That for upwards of seven years I was a member of the board of education for the said province.

3. To my knowledge, His Grace Archbishop Taché, archbishop of the Roman catholic ecclesiastical province of Manitoba, has been a member and chairman of the catholic section of the late board of education for four years, and I believe for a great deal longer.

4. That priests and leading laymen of the Roman catholic church were members of the catholic section of said board, and a number of priests of said Roman catholic church were inspectors of schools under said board.

5. I am satisfied that the school acts in force in this province prior to the first day of May last, were acceptable to the Roman catholic church.

WM. HESPELER.

Sworn before me at the city of Winnipeg, in the county of Selkirk, this 21st day of October, 1890.

R. M. THOMPSON, *A Commissioner in B. R., &c.*

In the Queen's Bench

In the matter of an application to quash by-laws 480 and 483, of the city of Winnipeg.

I, Alexander Polson, of the city of Winnipeg, in the county of Selkirk, in the province of Manitoba, health inspector, make oath and say :

1. That for a period of fifty years I have been a resident in the province of Manitoba.

2. That schools which existed prior to the province of Manitoba entering confederation were purely private schools and were not in any way subject to public control nor did they in any way receive public support.

3. No school taxes were collected by any authority prior to the province of Manitoba entering confederation and there were no means by which any person could be forced by law to support any of said private schools. I think the only public revenue of any kind then collected was the customs duty usually four per cent.

ALEXANDER POLSON.

Sworn before me at the city of Winnipeg, in the county of Selkirk, this 22nd day of October, A.D., 1890.

J. H. MUNSON, *A Commissioner in B. R., &c.*

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

I, John Sutherland, of the parish of Kildonan, in the county of Selkirk, in the province of Manitoba, farmer, make oath and say :

1. That for the period of fifty-three years I have been a resident in the province of Manitoba.

2. That schools which existed prior to the province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control nor did they in any way receive public support.

3. No school taxes were collected by any authority prior to the province of Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of said private schools I think the only public revenue of any kind then collected was the customs duty, usually four per cent.

JOHN SUTHERLAND.

Sworn before me at the city of Winnipeg, in the county of Selkirk, this 22nd day of October, A.D., 1890.

T. H. GILMOUR, *A Commissioner in B. R., &c.*

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

Upon reading a summons herein dated this 7th day of October, 1890, and upon reading the affidavits and papers filed, and upon hearing the attorney on behalf of the applicant, John Kelly Barrett, and of the said the city of Winnipeg.

I do order that the said summons be, and the same is hereby dismissed with costs to be paid by the said John Kelly Barrett, of the said the city of Winnipeg, forthwith on taxation thereof by the master.

A. C. KILLAM, *J.*

Dated at Chambers this 24th day of November, 1890.

In the Queen's Bench.

IN RE BY-LAWS NOS. 480 AND 483, CITY OF WINNIPEG.

November 24th, 1890.

KILLAM, *J.*

This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg, numbered 480 and 483. The application is made under the 258th section of the municipal act, 53 Vic., c. 51 M.

By-law no. 480 is that passed for levying a rate for municipal and school purposes in the city of Winnipeg for the year 1890. It recites the aggregate amount necessary to be raised to meet interest on debentures and ordinary current municipal and school purposes without distinction, and the total value of the rateable property in the city as shown by last revised assessment rolls, and enacts that there shall be raised, collected and levied, a rate of two cents on the dollar upon the whole assessed value of the real and personal property in the city of Winnipeg according to such rolls for meeting the expenditures mentioned.

By-law no. 483 simply amends the former by-law. It recites that the property of certain corporations is exempt from ordinary municipal taxation and liable only for school rates and that it is desirable to distinguish the rates providing for city schools, but so that the total several rates shall not exceed two cents on the dollar, and proceeds to amend the other by-law so as to make the rate 15. 4–5 mills on the dollar for interest

on debentures and the ordinary current municipal expenditure for the year, and 4. 1–5 mills for school purposes for the year.

The summons asks that these by-laws be quashed "for illegality and that for the following among other grounds : That because by the said by-laws the amounts to be levied for school purposes for the protestant and Roman catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum." No other ground is specifically taken in the summons.

The applicant shows that he is a rate-payer and a resident of the city of Winnipeg, and a member of the Roman catholic church, and that the effect of these by-laws is that one rate is levied upon all protestant and Roman catholic rate-payers in order to raise the amount required for school purposes, and the result to individual rate-payers is "that each protestant will have to pay less than if he were assessed for protestant schools alone, and each Roman catholic will have to pay more than if he were assessed for Roman catholic schools alone."

By the Manitoba school act passed in 1881, 44 Vic, 3rd sess, c. 4, and the previous statutes of this province, the public schools were under the control of a body known as the board of education, divided into two sections, composed respectively of the protestant and Roman catholic members of the board, and two superintendents, one being taken from each section of the board. Under the various statutes enacted from time to time, provisions were made for the formation in different ways of school districts under the control of the different sections of the board and the corresponding superintendents. The system which finally prevailed was first adopted in 1875 by the act, 38 Vic., c. 27, M., but various amendments in details were made from time to time. The last complete act was that of 44 Vic, of which amendments are found in the statutes of nearly every year previous to 1890. Under this legislation the school districts were directly governed by school trustees elected respectively by protestant and Roman catholic ratepayers who constituted in each district a body corporate known finally as "The School Trustees for the Protestant –or Catholic as the case might be School District of number in the Province of Manitoba." See 38 Vic, c. 27; 42 Vic, c. 2; C. S. M., c. 62; 44 Vic., 3rd sess., c. 4; 48 Vic, c 27, s. 23. These school districts, protestant and catholic respectively, were wholly independent of each other, and might cover the territory wholly or partially In cases of incorporated cities and towns, the respective districts of each denomination were usually co-terminous with the cities or towns themselves. See 44 Vic., c 4, s. 15, 47 Vic., c. 37, s. 4, 47 Vic., c 54, s. 2.

With the exception of some limited rates charged to non-residents having children attending the schools, the moneys for the support of schools were derived partly from grants by the legislature of provincial moneys, and partly by direct taxation levied by the trustees themselves or by the municipal officers or partly by each.

The sums granted by the legislature were apportioned between the two sections of the board of education for distribution by them among their respective schools. Provision was made to secure the levying of the taxes for the support of the schools in the protestant school districts upon the property of protestants alone, and in Roman catholic districts, upon that of Roman catholics alone, with an apportionment between them of taxes upon the property of corporations and of those persons who could not be considered to belong to either body. See 44 Vic., 3rd sess., c. 4, ss. 28, 30, 31, 32; 47 Vic., c. 37, s. 11.

One method of realizing by assessment was the submission by the trustees of a school district to the council of the municipality in which the district was situate, of an estimate of the sums required by such trustees for school purposes, during the current school year, the municipal council being required to levy and collect the sums by assessment upon the real and personal property, in the district of the protestants and Roman catholics respectively. See 44 Vic. c. 4. ss. 25, 27, 28, 30, 31, 32; 46 & 47 Vic. c. 4. s. 8. 47 Vic. c. 37. ss. 8, 10, 11; 48 Vic. c. 27. s. 9; s-ss (a) (f) s. 10. s-s (d), s. 17, s-s (d) 50 Vic. c. 18, ss. 7, 8.

By the 182nd section of the public schools act, 53 Vic., c. 38 M. all of these former statutes were repealed, and by that and the next preceding act, c. 37, the legis-

lature assumed to establish an entirely different system. A department of education is created to consist of the executive council or a committee thereof with certain prescribed powers in reference to education, and provision was also made for the election and appointment of an advisory board with certain defined functions. Approximately it may be said that these bodies took the place of the old board of education.

By section 3 of the public schools act, "all protestant and catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments and rate bills heretofore duly made in relation to protestant or catholic schools, and existing when this act comes into force, shall be subject to the provisions of this act."

By section 4, the term for which each school trustee held office was to continue as if created under the act. By section 86, sub-sec. 5, the board of school trustees in cities, towns and villages is "to prepare from time to time and lay before the municipal council of the city, town or village on or before the first day of August, an estimate of the sums which they think requisite for all necessary expenses of the schools under their charge."

By the 90th section, the council of every rural municipality is to levy on the taxable property in each school district the sum required by such district in addition to the legislative grant and a general municipal levy provided for by the 89th section.

By the 92nd section, the municipal council of every city, town and village is to "levy and collect upon the taxable property within the municipality in the manner provided in this act and in the municipal and assessment acts, such sums as may be required by the public school trustees for school purposes."

By section 93 the taxable property in a municipality for school purposes, is to include all property liable to municipal taxation and also all property exempted by the council from municipal and not from school taxation.

By the 179th section, in cases where, before the coming into force of the act, catholic school districts had been established, covering the same territory as any protestant school districts, such catholic school districts were upon the coming into force of the act to cease to exist. By the 183rd section, the act was to come into force on the first day of May, 1890.

By the 5th section "all public schools shall be free schools." By the 6th section, "religious exercises in the public schools shall be conducted according to the regulations of the advisory board," with provision for excusing the attendance upon such exercises of any child whose parent or guardian may so desire. By the 8th section, "the public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

It is shown that on and prior to the 30th April last, a school district which had some years before been established, existed in the city of Winnipeg and that such district was under the direction and management of the corporation known as "The School Trustees for the Catholic School District for Winnipeg, No. 1 in the Province of Manitoba" that this corporation had established and in operation a number of schools in Winnipeg under the provisions of the various provincial statutes relating to schools to one of which the applicant has been in the habit of sending his children for instruction; that this latter school is still continued with the same teaching and religious exercises as previously and the applicant's children still attend it.

While it is to be noted in this connection, that it does not appear under what authority this particular school is now conducted, or whether the teaching and religious exercises referred to are warranted by the regulations, if any, of the advisory board, I do not think that anything turns upon these points. It also appears that on the 28th of April last, there were presented to the clerk of the city of Winnipeg an estimate and requisition in writing, of "The Board of School Trustees for the Protestant School District of Winnipeg, No. 1, in the Province of Manitoba," for the levy and collection by the city council of $75,000 for the school year 1890, accompanied by a list of the names of those liable to be assessed for the support of protestant schools, and that on the 29th of April last, a similar estimate and requisition were submitted on behalf of the "School Trustees of the Winnipeg Catholic School District," for the

levy of $2,550 for the support of their schools for the year 1890, with a list of names of persons liable to assessment for the same. It is shown that these estimates and requisitions were submitted to and approved by the city council, and are those on which the by-laws, in so far as they impose a rate for school purposes are based. It is not contended that if the public schools act is valid and in force it was improper to levy a rate based on these estimates alone.

The contention of the applicant is, that the old law is still in force, and that the amounts of these estimates should have been levied separately upon protestant and Roman catholic rate-payers. The argument for this view is based upon a claim that the public schools act of 1890 is *ultra vires* of the provincial legislature, and that the repeal of the former statutes was intended to operate only for the purpose of substituting the one system for the other, and should be deemed inoperative. It is sufficient however, for present purposes to consider whether it was *intra vires* of the legislature to establish such a system of schools as is provided by the new act, and to authorize the raising of money for their support by a general assessment upon the property of all irrespective of religious belief and without providing for the support of separate schools for any class.

I have referred to the old acts as shortly as possible, rather in order to explain the form of the objection taken in the summons and as illustrative of one system which the applicant contends to have been within the powers of the legislature to establish, than because I can conceive that the adoption at one time of such a system could limit the authority of the legislature thereafter.

By the second section of the statute, usually known as the Manitoba act, 33 Vic., c. 3 D., confirmed by the Imperial act, 34 and 35 Vic., c. 28, the provisions of the British North America act, 1867, "Except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, or only to affect one or more, but not the whole of the provinces" then composing the dominion, and except so far as the same might be varied by the Manitoba act itself, were to "be applicable to the province of Manitoba in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said act."

By the British North America act, 1867, section 92, "In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say".. .. "(2) Direct taxation within the province in order to the raising of a revenue for provincial purposes" .. .."(8) Municipal institutions in the province." And by section 93, "In and for each province, the legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province of the union; (2) All the powers, privileges and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the queen's Roman catholic subjects, shall be, and the same are hereby extended to the dissentient schools of the queen's protestant and Roman catholic subjects in Quebec; (3) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the governor general in council from any act or decision of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education." A fourth sub-section provides for the enactment by the parliament of Canada, so far as may be necessary, of laws requisite to the carrying out of the decision on such appeal.

By the 22nd section of the Manitoba act, "In and for the province the said legislature" (*i. e.*, the provincial legislature) "may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union;

(2) An appeal shall lie to the governor general in council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education." A third sub-section is added similar to sub-section 4 of the 93rd section of the British North America act.

Now it is obvious that if there were merely the authority to legislate in relation to education without the limitations imposed by these sub-sections, it would be quite competent for the provincial legislature to enact such a statute as the public schools act. It is in the sub-sections that the difficulty lies. It appears to me that these sub-sections can only be properly understood by a comparison of them with the corresponding limiting sub-sections of the British North America act, 1867, and by a consideration of the laws of the four original provinces of the dominion, at the time of their union, as well as that of the law and practice with reference to education in this portion of British North America, at the time of its union with Canada. In each of the provinces originally united to form the dominion of Canada, there existed at the union, a system of public schools supported, partly by grants of money by the provincial legislature out of the general funds of the province and partly by direct taxation through municipal bodies or boards of school trustees or commissioners, with, in Lower Canada and New Brunswick, an option to localities to substitute voluntary subscriptions for compulsory taxation. There was, however, this difference, that in Nova Scotia and New Brunswick there was no provision for the support of separate schools for any class in a similar way or for the exemption of any class from liability to be taxed for the support of the general system, as there was in the old province of Canada.

Of the latter province there were, as is well known, two great political divisions, at one time forming separate provinces for which the laws in some respects differed. In Upper Canada, now the province of Ontario, the public schools were regulated by the acts C. S. U. C. cc. 64, 65 with some amendments, the most important of which were contained in the act 26 Vic. c. 5. By the second of these acts, protestants could establish separate schools in school sections in which the teachers of what were called the common schools were Roman catholics, and were then exempted from contributing to the support of the common schools, by sending their children to, or contributing to a certain extent to the support of such separate schools. And by the same act as amended by the third one mentioned, similar provision was made for enabling the Roman catholics in any school section to establish separate schools for themselves, and to become exempt from contributing to the support of the common schools, as long as they should continue to be supporters of such separate schools. For the purposes of these separate schools, protestant or Roman catholic, it was requisite that there should be a certain number of the particular religious faith to initiate the proceedings necessary to the establishment of such separate schools.

In Lower Canada, now the province of Quebec, the public schools were regulated by the act C. S. L. C. c. 15 with some amendments. If the rules and regulations for the government of a common school were not satisfactory to any number of the inhabitants of a municipality professing a religious belief different from that of the majority, these inhabitants could establish dissentient schools under the government of their own trustees and become exempt from taxation for school purposes by any but these trustees where there were such.

Both in Upper and in Lower Canada, the supporters of the separate or dissentient schools were by express enactments entitled to have proportionate shares of provincial moneys granted for the support of common schools, applied in aid of such separate or dissentient schools and to have rates levied for the support of the latter upon those of the appropriate classes respectively.

In Nova Scotia the schools were regulated by the acts R. S. N. S. [3rd series] c. 58; 28 Vic., cc. 28, 29; 29 Vic., c. 30; and in New Brunswick by the act 21 Vic., c. 9; in each case with some subsequent unimportant amendments. Upon the face of the statutes, it is clear that in Nova Scotia these schools were not in any respect denominational in the usual sense of that term. For New Brunswick, any possibility of con-

tention that they were denominational in the sense in which that term is used in the British North America act, 1867, is precluded by the decision of the supreme court of New Brunswick, in *Exparte Renaud*, 1 Pugs. N.B.R., 273; 2 Cartwr. Cas. 445 affirmed on appeal by the judicial committee of the privy council. The reasoning in this case would also seem to apply to the common schools of Upper Canada. In Lower Canada, an element of a denominational character not found in the other provinces, was attached to the common schools in a requirement that the text books relating to religion and morals, were to be chosen by the officiating priest or clergyman of each school section, for use in the schools by children of his religious belief. See C. S. L. C. c. 15, s. 65, ss. 2.

From the judgments in the New Brunswick case referred to, it appears also that at the union there existed in that province, distinctively denominational schools, to which the provincial legislature had from time to time made grants of public moneys. The same was also to some extent the case in Nova Scotia, and I believe in the old province of Canada.

There were then two wholly different sets of circumstances existing in Canada and the maritime provinces when they were united, to which the limitations in the subsections of the 93rd section of the confederation act became applicable. In the former there were what I conceive to have been denominational schools recognized by law, the supporters of which could invoke the authority of the law to maintain them by compulsory assessments upon their co-religionists and could, by so doing, relieve themselves from liability to assessment for the support of the common schools, and were by law entitled to have apportioned to them a share of the provincial funds granted in aid of common schools. Thus there were distinct classes of persons having distinct rights and privileges in respect of denominational schools, among which was that of obtaining immunity from taxation for the support of the common schools. This immunity could well be said to be a right or privilege in respect of denominational schools as being dependent upon the establishment and support of such schools

In the maritime provinces all could be compelled to contribute to the support of the public schools by direct taxation without reference to religious beliefs or the existence of denominational schools, and there was no recognizable right to have the latter maintained in any way at the public expense or by any system of taxation.

When, however, we come to Manitoba, we are met at the outset by the difficulty that there was no public school system supported by public funds or by any mode of taxation. The existence of such in the other provinces served to determine whether there was a right to immunity from such taxation or not. Here, that indication is wholly wanting.

The position of affairs with reference to education in the territory constituting the province of Manitoba at the time of its union with Canada, is distinctly stated by his grace the archbishop of St. Boniface in an affidavit filed in support of the motion as follows: "2. Prior to the passage of the act of the dominion of Canada passed in the thirty-third year of the reign of her majesty Queen Victoria, chapter three, known as the Manitoba act, and prior to the order in council issued in pursuance thereof, there existed in the territory now constituting the province of Manitoba, a number of effective schools for children. 3. These schools were denominational schools, some of them being regulated and controlled by the Roman catholic church and others by various protestant denominations. 4. The means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church contributed by its members. 5. During the period referred to, Roman catholics had no interest in, or control over, the schools of the protestant denominations, and the members of the protestant denominations had no interest in, or control over, the schools of the Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic church supported the schools of their own church for the benefit of Roman catholic children and were not under obligation to, and did not contribute to the support of any other schools. 6. In the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth."

And in two affidavits filed in opposition to the motion it is stated, "That schools which existed prior to the province of Manitoba entering confederation, were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority prior to Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of said private schools."

While, then, these supplement to some extent, the affidavit of his grace, they are in no way inconsistent with it, and taken altogether the affidavits show with sufficient clearness, the state of affairs with reference to which the 22nd section of the Manitoba act must be construed.

Now that section differs from the corresponding section of the original confederation act in four particulars, first, in the insertion in the first sub-section of the words "or practice" to which so much importance has been attached in argument, secondly, in the omission of any clause corresponding to the second sub-section of the original act, thirdly, in the extension of the right to appeal to the governor general in council to acts or decisions of the provincial legislature; and fourthly, in the right of appeal being given absolutely and not conditionally upon the previous existence or subsequent establishment of a system of separate or dissentient schools.

And here, I must say with reference to an argument that the third sub-section of the 93rd section of the original act is one applicable to the whole of the provinces of the dominion, and therefore, by the terms of the second section of the Manitoba act, to be read into the latter act, in addition to the 22nd section of the latter, that this 22nd section gives power to the legislature to make laws in relation to education, subject and according to certain provisions, and that if the reading into the act of any portion of the original 93rd section, would involve either an extension or a limitation of the powers of the provincial legislature beyond those fixed by the terms of this 22nd section, there would be an inconsistency with the Manitoba act, which is excluded by the express terms of its second section. The course of the legislation and the meaning of the first statute, are of the greatest importance in interpreting the second, but I cannot consider any portion of the 93rd section of the former to be incorporated into the second act.

The first question naturally arising is, as to whether the public schools act itself, creates a system of denominational schools, or assumes to compel any class to support denominational schools other than their own Upon the face of the statute it does not. The affidavit of his grace the archbishop, however, appears to be intended to lay a foundation for an argument, that what are called in this act "public schools," are really schools of a protestant denominational character, although the act upon its face declares that they are to be unsectarian

After setting forth the importance which Roman catholics attach to the combination of religious with secular instruction, the use of religious exercises in schools; the supervision of the church over the schools, training of their children in the doctrines and faith of their church, the appointment of teachers who are not only members of that church, but also thoroughly imbued with its principles and faith and who recognize its spiritual authority and conform to its direction and the use of a certain class of text books, he goes on to say, that the church regards the schools provided for by "the public schools act" "as unfit for the purpose of educating their children and the children of Roman catholic parents will not attend such schools, 'but that' protestants are satisfied with the system of education provided for by the said act" and "are perfectly willing to send their children to the schools established and provided for by the said act" that "such schools are in fact, similar in all respects, to the schools maintained by the protestants under the legislation in force immediately prior to the passage of the said act." He then proceeds. "The main and fundamental difference between protestants and Roman catholics with reference to education is, that while many protestants would like education to be of a more distinctly religious character than that provided for by the said act yet they are content with that which is so provided and have no conscientious scruples against such a system; the catholics, on the other hand, insist upon education being thoroughly permeated with religion and religious aspects."

In so far as there is any material in reply to this affidavit, it does not appear to be contradicted. Indeed, it seems rather to be supported upon material points as regards the adherents of the presbyterian church by the affidavit of the Rev. Dr. Bryce.

Here, however, I cannot conceive myself to be bound by, or confined to affidavit evidence. I am interpreting statutes and in so doing, I am at liberty to take judicial notice of the circumstances with respect to which they are to be construed. I do not say this because I conceive that there is anything really untrue or intended to mislead or to give a false colouring to beliefs in any of the affidavits. Indeed they appear to me to offer in most respects a very fair view of the relative attitudes of most protestants on the one side, and most Roman catholics and the Roman catholic church as a body on the other side. I am not, however, convinced that there is any such distinctive difference between protestants generally and Roman catholics generally upon this question, as to constitute a mark of denominational division and to make what would ordinarily be termed non-denominational schools, really "denominational" within the meaning of the Manitoba act as between protestants and Roman catholics.

From my experience I would say that very many protestants have as strong opinions upon the importance of combining religious with secular instruction as any Roman catholics. In support of this view, I need only refer to the report of the royal commission, appointed in 1886, to enquire into the working of the elementary education act in England and Wales.

The difficulty lies in arriving at any agreement upon the nature and extent of the religious training and in securing that it shall be satisfactorily conducted.

To insure the latter, most Roman catholics and very many protestants desire to have the education of the young conducted in denominational schools under the control of those connected with their respective churches. The evidence of this is found in the existence and maintenance of just such denominational schools wholly apart from institutions of a collegiate character to which reference was made in *Exparte Renaud* and which are maintained by protestants and attended by children of protestants in all parts of Canada as elsewhere.

The question whether wholly, or how far the public schools should be devoted to secular training, is a grave one, upon which I have not now to express an opinion, but it is impossible not to see that there is much reason to believe that the non-sectarian system tends to the exclusion from the schools, of the religious instruction, to which so many naturally attach the greatest importance ; or to make the religious exercises and training conform to the views of the majority in the state. But if the school authorities act improperly, or without proper judgment, religious exercises and training as offensive to many protestants as to any Roman catholics, may find their way into the schools.

The controversy is an old one, and its whole history appears to show that it is one between denominational and non-denominational schools, and that those established under the public schools act, are not denominational in the sense of that controversy, or of the Manitoba act, or the British North America act, 1867, which must be deemed to speak with reference to that controversy.

These views are supported by the judgment in the New Brunswick case before referred to, the arguments in which I shall not now delay to repeat. I am not aware of the existence of any extended report of the opinions of the judicial committee of the privy council in that case. The only reference to the appeal that I have seen, is that found in 2 Cartwr. Cas. on the B. N. A. act at page 486, which purports to have been taken from the *London Times*, of the 18th of July, 1874, and which states merely that "Lord Justice James after conferring with the other members of the committee gave judgment without calling upon the respondents," and that "their lordships concurred in the opinions of the court below, and would advise her majesty that the appeal be dismissed with costs."

Now the rights and privileges protected by the first sub-section are those with respect to denominational schools which some class or classes of persons had before the union.

I have shown how it may be said that the right to obtain immunity from taxation for the support of the common schools, in the old province of Canada, could be said to

be a right or privilege with respect to denominational schools, and to have been possessed by classes of persons. It is to be noticed that it was enjoyed, not as directly dependent upon belief in denominational schools as the only proper system, or upon support of any but the state system of separate or dissentient schools, and only if such should be established and kept up, which, if there were not sufficient of the requisite religious views or desirous of maintaining them could not by law be done in Upper Canada or in practice in either portion of the province.

But under the state of affairs existing here before the union with Canada, there was simply an absence of any law requiring any person to contribute to the support of schools. It was not dependent upon or connected with denominational schools, and cannot be said to have been either by law or practice a right or privilege with respect to denominational schools.

But it is necessary to consider whether the public schools act in consequence of its effect upon denominational schools themselves or the practice of establishing, maintaining and having their children educated in denominational schools which is shown to have been exercised by certain classes before the union, prejudicially affects any right or privilege in respect of such schools which these classes had at the union.

The act in no way prohibits attendance upon or the maintenance of denominational schools or attempts to make attendance upon the public schools compulsory ; it is, however, suggested that the act prejudicially affects such rights or privileges in two ways. First, by establishing in competition with the denominational schools, a system of free schools supported by the public funds, and thereby placing the denominational schools at a great disadvantage, and secondly, by withdrawing from the hands of those who would be desirous of supporting denominational schools, funds which they would otherwise devote to that purpose.

While in practice, the denominational schools existing before the union, were not subject to the competition referred to, it was quite competent for any person or persons desirous of doing so, to establish and maintain non-denominational schools free or otherwise. By right or privilege, I cannot conceive that mere absence, in fact, of something which would render another thing less valuable is meant. The argument is really a plea for the monopoly of educational privileges by certain institutions or bodies or by institutions or bodies of a certain character. To such a monopoly there was no recognized right or privilege, either by law or practice. If there was no right to be free from competition there was none such to be free from the competition of free schools or of those supported by the state. The circumstances existing in the older provinces and the general nature of the school systems in America, suggest at once that it must have been contemplated in the enactment of the Manitoba act that the legislature of Manitoba should be at liberty to establish a system of free non-denominational public schools, and provide for their support by grants of provincial funds or direct taxation or by both methods Under the powers given, it would be open to the legislature to make laws to encourage or to restrict education, provided the protected rights and privileges were not prejudicially affected, but we may well assume that encouragement rather than restriction would be anticipated. Certainly it was intended to be open to the legislature to determine in its wisdom that popular ignorance is an evil, and to seek to guard against such by providing for all, at the public expense, free secular education of such character as to it should seem proper. It may be that the opportunities thus offered would naturally draw to the public schools, pupils who would otherwise attend denominational schools and contribute to the support of the latter and thus enable those in charge of the latter to maintain them at a higher degree of efficiency. It may be, on the other hand, that the competition would only stimulate the supporters of denominational schools to greater exertions and insure a higher standard in such schools ; in either view, however, the effect would be an indirect one, and it would rather be an effect upon the schools themselves and their supporters than upon any right or privilege with respect to such schools. It does not appear to me that in the non-existence before the union of competition of that character there can be recognized a right or privilege with respect to denominational schools, existing either by law or by practice.

It was, as I think, beyond question that it was intended that the legislature should be able to make laws for providing against popular ignorance as being an evil, and to authorize the incurring of expense for the purpose, and the levying of taxes to meet such expense as upon any other subject within its powers. I am unable, therefore, to regard the circumstance that in some cases the expense thus occasioned to individuals may render them less able or less willing to contribute to the support of denominational schools, as showing that the legislation prejudicially affects a right or privilege in respect of such schools. The effect is so indirect and remote that I cannot take it to be within the act, and it is precisely the same effect that would be produced by taxation for other purposes within the powers of the legislature

It is, however, urged that even though the natural meaning of the language of the statutes would lead to such conclusions as these, the history of the controversy respecting separate or denominational schools in the other provinces and elsewhere, and the mode in which it was settled for the other provinces by the original confederation act, and the changes made in the wording of the Manitoba act, show that it was intended that a more enlarged view of the protected rights and privileges should be taken.

Now in the first place, it is not correct as claimed, that the original Act assumed to settle the question for Canada; it merely guarded rights and privileges already given in each province. In Nova Scotia and New Brunswick, the question still remains an open one. There was, then, no intention under the original act, that the question should be settled for Canada generally in favour of the immunity of any class from taxation for the support of non-denominational public schools, excepting so far as such immunity had previously existed by law.

Counsel for the applicant forget that the question has two sides, and that there are many who deem it more for the interest of the state to encourage only one system of schools, and that the definite settlement of such an important question ought naturally to be expressed in clear language. It was evidently considered that the rights of minorities in Lower Canada should be extended or at any rate more distinctly preserved so as to be securely placed upon the same basis in Ontario and Quebec. When, therefore, parliament intended to settle what had not previously been settled, or which it feared had not previously been settled, it did so.

While the older provinces had had before the union, their own legislatures, representative of popular opinion to settle this question for them, none such had existed here, and it is difficult to believe without clear evidence that parliament had considered, and settled the matter, that parliament would have desired to preclude this portion of Canada from considering this question for itself. The language of the British North America act was sufficiently definite, having reference to the express legislation of the previous provinces, but with no express law here to which reference could be made, it was certainly as important as in the case of Quebec, to make the position clear if it was to be as the applicant contends.

I attach very little importance to the words "or practice" as definitely showing any such intention. The position of affairs here before the union was anomalous. Both the extent of the territorial jurisdiction of the Hudson's Bay Company and the nature of its authority had been regarded as very doubtful. Its government was recognized, however, as being the *de facto* one, and the Manitoba act shows in other parts, the intention to recognize what had been regarded as rights under the old regime irrespective of strict law. Under such circumstances, the introduction of the words was quite natural and I cannot take them as adding to the ordinary sense of the whole enactment. The change in the second sub-section from the language of the third sub-section of the 93rd section of the original act appears to me, infinitely more important. In the original act the appeal to the governor general in Council was given only in provinces in which there had existed, prior to the union, a system of separate or dissentient schools, or in which such should afterwards be established. In the case of Manitoba it was given absolutely which may be claimed to show that parliament contemplated that practically such a system had existed here before the union, or was at any rate secured by the first sub-section in connection with any system of public schools which might be established

by the legislature. It would be natural too, if this were the idea existing, that an appeal should have been given from an act of the legislature as well as from an act or decision of a provincial authority.

Now I must confess that I have not accounted satisfactorily to my own mind for this change of language. Little attention was paid to this sub-section upon the argument, and no suggestion was distinctly made upon it. Probably before the main question can be considered finally settled, or upon some appeal under the sub-section, a view may be suggested which will at once appear to be the true one. At present I can only suggest the alternative one, that it came about for much the same considerations as the introduction of the words "or practice." It may well have been felt that in view of the undetermined position of affairs, and of the absence of clear and express legislation to which reference could be made, it was advisable that the right of appeal should be more extended than in the case of the other provinces, and this appears to me to be the more reasonable and probable explanation. Now before the union, several classes of persons exercised the privilege of maintaining denominational schools in the territory now forming this province, of having their children educated in them, and of having inculcated therein the peculiar doctrines of their respective denominations. History teaches us that bigotry has frequently denied to minorities the exercise of some or all of these privileges. The right to continue their exercise is no unimportant one. Nay, if these privileges were attacked, they would soon appear of infinitely greater importance than the liability to pay taxes for the support of free non-sectarian public schools for the benefit of those choosing to take advantage of them. Taking then, the language of the union acts in its natural sense, important rights and privileges are guarded. It is not necessary to go beyond their natural meaning in order to give effect to any of the language used. I take the question here raised to be merely that of the liability of all property holders to be subjected to equal taxation for the support of free non-sectarian public schools which may be used by such as choose The right to immunity from such taxation was not, under the original confederation act, generally established throughout Canada in favour of any class or classes, and if intended to be established here, one would have expected this to be indicated by more distinct language than is found in the Manitoba act. Such immunity was general here before the union and not in any way existing in respect of denominational schools, or in favour of any class or classes: the denominational schools did not, by law or practice, enjoy any recognized right or privilege to be kept free from any kind of competition

The burden is naturally upon those who seek to limit the power of the legislature to choose from time to time, as circumstances change, between a sectarian and a non-sectarian system of public school education, or its exercise of the sovereign power of taxation in order to afford education free, if it thinks it necessary or advisable in the interests of the province, to any greater extent than is naturally involved in the language of the constitution. I am unable, therefore, to hold that the public schools act, if enacted at the outset of the union, would have been *ultra vires* in establishing this new system of schools and in authorizing the taxation complained of, without establishing or providing for the support of separate schools for any class. I think that it was quite competent for the legislature to abolish the system of separate schools, which it had established, and leave parties to recur to their voluntary denominational schools if they saw fit That they will do so, his grace the archbishop states. In so doing, he practically admits that they are at liberty to revert to the system existing before the union, though he claims that they will do so under certain disadvantages, the indirect causing of which, by the adoption of the new system, I cannot consider to be within the saving clauses of the constitution

Whether this be done, or whether Roman catholics submit wholly or partially, with heart burnings and dissatisfaction, to the new system of public schools, it is for the legislature and not for the courts to determine whether there can be such grave reasons of state as to warrant a disregard of the complaints of the minority. On the one hand it has the example of other legislatures to show that it is not alone in deeming the reasons sufficient. On the other, many will doubt whether human wisdom is so far infallible as to warrant absolute reliance upon the sufficiency of these reasons.

I can merely repeat the language of the learned chief justice of New Brunswick, now the chief justice of Canada: "It may be a very great hardship that a large class of persons should be compelled to contribute to the support of schools to which they are conscientiously opposed or be shut out from what they have hitherto, under certain circumstances enjoyed, and be without remedy, but, by any such considerations, courts of justice ought not to be influenced, hard cases, it has been repeatedly said, make bad law, and it has also been justly remarked that if there is a general hardship affecting a general class of persons, it is a consideration for the legislature, not for a court of justice."

The summons must be dismissed with costs.

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

Required that this matter be entered upon the list of causes, matters and proceedings for hearing by the court in banc upon the application of John Kelly Barrett, by way of motion to reverse the order or decision of Mr. Justice Killam, pronounced herein on the twenty-fourth day of November instant, dismissing with costs the summons granted herein on the seventh day of October, 1890, to quash the by-laws above referred to.

The applicant complains of the whole of the said order and desires that the same should be reversed with costs, and that the said summons should be made absolute with costs, upon the grounds among others set forth in the said summons.

Dated this twenty-seventh day of November, A.D 1890.

GERALD F. BROPHY, *Attorney for the Applicant.*

To the Prothonotary of the Court of Queen's Bench.

JUDGMENTS IN TERM.

TAYLOR, C.J.

The application to quash these by-laws raises the important question, whether the public schools act, 53 Vic., c. 38 (M. 1890), is one within the power of the legislature of this province to pass. It came in the first instance before my brother Killam, who, in a considered judgment upheld the validity of the act, and dismissed the summons. From his decision an appeal was taken, which has now to be disposed of.

The by-law no. 480, dated 14th July, 1890, provides for levying by assessment the amount required for the municipal and school purposes of the city of Winnipeg, for the current municipal year 1890. By-law no. 483, dated 28th July, 1890, amends the former by-law in several respects. Under these two by-laws a rate of two cents on the dollar is to be raised, levied and collected on the whole assessed value of the real and personal property in the city of Winnipeg, the proportion required for school purposes being four and one-fifth mills on the dollar.

The only ground specifically stated in the original summons as that on which it is sought to quash these by-laws is, "Because by the said by-laws the amounts to be levied for school purposes for the protestant and catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum." There is no question raised that the assessment in the manner provided for by these by-laws is not in accordance with the provisions of the public schools act.

It is claimed that the school law in force in the province before the passing of that act, and which it professes to repeal, is still in force. Under that earlier law there was one board of education, which for certain purposes acted as a united board, but which was also divided into two sections, a protestant section consisting of all the protestant members, and a Roman catholic section, consisting of the Roman catholic members. The school districts throughout the province were divided into protestant and catholic. The

protestant schools were under the control of the protestant section of the board, and the trustees of these schools were elected by the protestant ratepayers. The Roman catholic section of the board had in like manner entire control of the catholic schools, and the catholic ratepayers elected the trustees. There was also one superintendent of education for the protestant schools, and another for the catholic schools. The law also provided for levying the taxes for the support of schools in protestant school districts, upon the property of protestants alone, and in Roman catholic school districts upon Roman catholics only. Provision was also made for apportioning taxes derived from the property of corporations, or of persons who could not be considered to belong to either body. The grant made annually by the legislature for educational purposes was apportioned between the two sections of the board, for distribution among the schools under the charge of each respectively.

The objection to the public schools act is, that it is not one within the power of the provincial legislature to pass, having regard to the limitations upon their power of legislating on the subject of education, imposed by sec. 22 of the Manitoba act, 33 Vic., c. 3 (D., 1890).

That section is as follows:- "In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union, (2) An appeal shall lie to the governor general in council from any act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education; (3) In case any provincial law, as from time to time seems to the governor general in council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the governor general in council, on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section, or of any decision of the governor general in council under this section."

A section similar in character is found in the British North America act, as section 93. There are differences between the two sections, and when parliament, in the Manitoba act, used different language, it must be assumed that there was some definite intention in doing so. The differences between the two sections are the following: --Sub-section 1 of section 93, speaks of any right or privilege as to denominational schools which "any class of persons have by law in the province at the union," while in sub-section 1 of section 22, the right or privilege is spoken of as that which "any class of persons have by law or practice." Section 93 has as sub-section 2, a clause relating solely to the provinces of Ontario and Quebec which does not appear in section 22. In sub-section 3 of section 93, the words, "Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province," are found immediately before what appears in section 22 as sub-section 4. Then sub-section 3 of section 93, provides for an appeal to the governor general in council only from any act or decision of any provincial authority, while sub-section 2 of section 22, says that an appeal shall lie "from any act or decision of the legislature of the province or of any provincial authority." Sub-section 4, section 93, is the same as sub-section 3 of section 22, there being no change in the language.

Possibly, there is no practical difference in the effect of the changed language in sub-section 2, as to an appeal from an act or decision of the legislature as well as from an act or decision of any provincial authority. At all events in *Board of Trustees of the Separate Schools of Belleville vs. Grainger*, 25 Gr. 570, Blake, V.C., seems to have been of opinion that, "act of any provincial authority" used in section 93 would include an act of the provincial legislature.

It is under section 22 of the Manitoba act that the question raised in the present case must be considered, and the decision of it must be governed by the provisions of

that section. By section 2 of the Manitoba act the provisions of the British North America act are made applicable to the province of Manitoba, "except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to, or to affect only one or more, but not the whole of the provinces now comprising the dominion, and except so far as the same may be varied by this act." As section 93 does not profess to settle the question of education, and of separate or denominational schools for the whole dominion, but only for the provinces of Ontario and Quebec, and the question of education in the newly formed province of Manitoba is dealt with specially and in somewhat varied language, there can be no doubt that section 93 is not the one which must govern the decision in this case. As, however, section 22 was undoubtedly based on section 93, the terms of the latter are material, but only in so far as they may afford assistance in arriving at the true construction to be placed on the section of the Manitoba act

It was argued that when considering the meaning and intent of section 22, and applying its language, regard must be had to the condition of things existing in Upper Canada as to separate schools before confederation, and which led to section 93 finding a place in the British North America act It is said that in construing an act, its history must be considered, and that statutes *in pari materia*, must be construed together, the construction of one applied to the other Now, there is no doubt that the history of an act may be enquired into and considered by the court, where difficulty is found in construing it. The court must look not only at the words of the statute, but to the cause of making it, to ascertain the intent. *The King* v. *East Teignmouth*, 1 B & Ad, 249 Or, as it was expressed by Sir George Jessel in *Holme* v. *Guy*, 5 Ch, D. 905, "The court is not to be oblivious * * * of the history of law or legislation. Although the court is not at liberty to construe an act of parliament by the motives which influenced the legislature yet when the history of law and legislation tells the court, and prior judgments tell this present court, what the object of the legislature was, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view of extending it to something that was not intended." As Bramwell, B., said in *Attorney General* v *Sillem*, 2 H. & C., 531, "so perhaps, history may be referred to, to show what facts existed, bringing about a statute, and what matters influenced men's minds when it was made."

Previous statutes, *in pari materia*, may and ought to be looked at, when there are earlier acts relating to the same subject, the survey must extend to them, for all are for the purposes of construction considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs *Rex* v. *Loxdale*, 1 Burr, 445; *Duck* v *Addington*, 4 T. R. 447; *Mosley* v. *Stonehouse*, 7 East, 174.

In many cases the courts have taken great liberties with the wording of statutes, in order to effect what they believed to be the intention of parliament. In *Caledonian Rail. Co.*, v. *North British Rail. Co*, 6 App., Ca. 122, Lord Selborne said "The more literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effected" And the court of appeal held in *Exparte Walton*, 17 Ch., D. 746, that a statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.

All this is old law and was stated more than three hundred years ago in *Stradling* v. *Morgan*, Plowd. 199. "The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded acts which were general in words to be but particular, where the intent was particular." Then after referring to several cases, the report proceeds, "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to

extend to but some things; and those which generally prohibit people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by comparing one part of the act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature which they have always taken according to the necessity of the matter, and that which is consonant to reason and good discretion."

The eminent American jurist Chancellor Kent, has said in his Commentaries at p. 462, "The reason and intention of the lawgiver will control the strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity." The intention of the legislature is what ought to govern, and the object of the court must always be to ascertain what that intention is.

But after all, how is the intention of the legislature, the true meaning of a statute to be ascertained? The eminent jurist whose words have just been quoted says: "The true meaning of the statute is generally and properly to be sought from the body of the act itself." These extraneous helps in construing a statute seem resorted to when there is something doubtful in the wording of it; where the words are susceptible of more than one meaning, or where the language used is such as to raise difficulties in its grammatical construction. Thus in *Hollingworth* v. *Palmer*, 4 Ex. 282, Parke B, dealing with a particular section of an act, said, "This section is certainly most incorrectly worded, and it is, therefore, necessary to modify its language in order to give it a reasonable construction. The rule we have always followed of late years is to construe statutes, like all other written instruments, according to the ordinary grammatical sense of the words used, and if they appear contrary to or irreconcilable with the expressed intention of the legislature, or involve any absurdity or inconsistency in their provision they must be modified so as to obviate that inconvenience, but no further." And Bramwell, B. when using the language already quoted in *Attorney-General* v. *Sillem*, was speaking of statutes of doubtful meaning, for he said, "In this, as in other cases of doubtful meaning, it is legitimate to solve that doubt by ascertaining the general scope and object of the enactment * * * It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it." So Lord Wensleydale said in *Philpott* v. *St. George's Hospital*, 6 H. L. 366, "We ought to look to the words of the statute, and to give these words their natural and ordinary meaning." The proper mode of construing an important statute was considered by all the common law judges of England when called in to advise the house of lords in the *Sussex Peerage Case*, 11 Cl & F 143. Their unanimous opinion was delivered by C. J. Tindale. "The only rule for the construction of acts of parliament is that they should be construed according to the intent of parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground or cause of making the statute, and to have recourse to the preamble which, according to C. J. Dyer, is a key to open the mind of the makers of the act, and the mischiefs which they intended to redress."

I have spoken of how the intention and meaning of the legislature is to be ascertained, but the question for an interpreter of a statute is not, properly, what the legislature meant, but what its language means. *Palmer* v *Thatcher*, 3 Q. B. D. 353. Or, as the present lord chief justice of England said his course always is, to suppose that parliament meant, what parliament has clearly said, and not to limit plain words in an act of parliament by considerations of policy, *Coxhead* v. *Mullis*, 3 C. P. D., 442.

In the present case I do not see what assistance in answering the questions which arise here is to be got from an enquiry into the history of section 93 of the British North America act, or of the corresponding clause in the Manitoba act. Before confederation

there were in Ontario separate or dissentient schools in existence under an act of the parliament of Canada. The legislature which established these schools could at any time have put an end to them, and there can be no doubt the statesmen who framed the scheme of confederation intended by the provision in the British North America act, to secure that the provincial legislature, the body thereafter to deal with educational matters in Ontario, should not change the then existing state of things, but that it should be for ever continued. They also provided that all the powers, privileges and duties which were then conferred and imposed by law in Upper Canada on the separate schools and school trustees of Roman catholics should be extended to the dissentient schools of protestants or Roman catholics in Quebec. No provision was made for the provinces of Nova Scotia and New Brunswick in which at that time no separate schools existed by law. It cannot, therefore, be said that by this section 93, it was intended to settle for ever the question of separate schools in the dominion, for, if so, why was all mention of these two provinces omitted.

The argument was pressed that, by section 22 of the Manitoba act, parliament, in view of the controversy over separate schools in Ontario, could only have intended to secure for the Roman catholics of Manitoba the same rights and privileges as to separate schools which were by the British North America act secured for Ontario and Quebec. I cannot, however, see that parliament intended more than is expressed by the language used. It must be assumed that when the act came to be passed, parliament knew there were not at that time in the territory being organized as the province of Manitoba any separate or denominational schools existing by law. The act therefore says that, rights or privileges with respect to denominational schools which any class of persons had by law or practice, should not be prejudicially affected by future provincial legislation The intention of parliament is plain, no future provincial legislation is to prejudicially affect any right or privilege as to denominational schools, if any such right or privilege exists, and whatever it may be. What the parliament intended is not at all doubtful, although, perhaps, it is not so easy to say what exact meaning should be attached to the language used. Surely, had it been intended to secure to Roman catholics, or to any other class of persons in Manitoba, the same right of having separate schools, as is provided for in the province of Ontario, parliament would have said so. Parliament had before it the express provisions of the British North America act, on this subject, and would, I think, most certainly have followed that act had the intention been to settle the matter as that act settled it for Ontario and Quebec. The inference which it seems to me should be drawn from the altered form of the section rather is, that Parliament intended that as the people of the older provinces had settled this question for themselves, so it should be left for the people of the province, then being formed, to settle it for themselves. While so leaving it parliament naturally inserted a provision to secure that existing rights and privileges, whatever these might be, should not be disturbed by the settlement they might make.

What the court has to deal with is, did any such right or privilege exist, and, if so, has such right or privilege been prejudicially affected by the public schools act ?

The parts of section 22, which are of importance are, the section and first sub-section "In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons may have by law or practice in the province at the union."

It may be remarked here that when the court in New Brunswick dealt in *re* Renaud, 1 Pugs. N.B.R. 273, with the same words in section 93 of the British North America act, they held that they were not intended to distinguish between protestant and Roman catholics. It was held in the judgment delivered by the learned chief justice, now chief justice of the supreme court of Canada, that sub-section one meant just what it expresses, that "any," that is every "class of persons" having any right or privilege with respect to denominational schools, whether such class should be one of the numerous denominations of protestants or Roman catholics, should be protected in such rights. As the

judgment of the court in New Brunswick was affirmed on appeal by the judicial committee of the privy council, approving of the reasons given in the court below, it must be assumed that this was regarded by the ultimate court of appeal as the true construction of the sub-section.

Are then the members of the Roman catholic church in Manitoba a class of persons who had at the time of the union, by law or practice, any right or privilege with respect to denominational schools? And if so, does the public schools act prejudicially affect any such right or privilege?

Happily there is no dispute as to the facts, as to the state of affairs with reference to education, existing at the time of the union and upon which the claim to possess certain rights and privileges is based.

In an affidavit made by the archbishop of St. Boniface, and filed in support of the application, his grace says that, prior to the passing of the Manitoba act, "There existed in the territory now constituting the province of Manitoba a number of effective schools for children, (3) These schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, others by various protestant denominations; (4) The means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the church, contributed by its members; (5) During the period referred to Roman catholics had no interest in or control over the schools of the protestant denominations, and the members of the protestant denominationshad no interest in or control over the schools of Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic church supported the schools of their own church for the benefit of Roman catholic children, and were not under obligation to, and did not contribute to the support of any other schools; (6) In the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth." In answer to the application, two affidavits were filed, made by Alexander Polson and John Sutherland, residents of the province for fifty years, and these are in no way inconsistent with the affidavit of his grace the archbishop. In each of them it is stated, "That schools which existed prior to the province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority prior to the province of Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of said private schools. I think the only public revenue of any kind then collected was the customs duty, usually four per cent."

Had Roman catholics, as a class of persons, what can be considered or called rights and privileges within the ordinary meaning of these words as used in the act? There were schools established and carried on, the expense of which was defrayed by Roman catholics Episcopalians and presbyterians had the same right and also carried on and defrayed the expense of schools. Every other protestant denomination had the same right, and so had every private individual. Any man could establish and carry on a school at his own expense if he chose to do so.

It seems to me the utmost the Roman catholics can be said to have had, was what may be called a moral right. Had the words "right or privilege" stood alone in the act, it could not, I think, be said they had any, which is prejudicially affected by the public schools act.

"A right" is in the *Imperial Dictionary* defined to be, "A just claim, or that to which one has a just claim; that which may be lawfully claimed of any other person * * * In law, that which the law directs, a liberty of doing or possessing something consistently with law." In *Bouvier's Law Dictionary* it is said to be "The correlative of duty, for whenever one has a right due to him, some other must owe him a duty." And in *Browne's Law Dictionary*, it is said to be, "A lawful title or claim to anything."

Wharton's Law Lexicon defines, "Right" as "a liberty of doing or possessing something consistently with law."

In the *Imperial Dictionary* "privilege" is defined as, "a right, immunity, benefit, or advantage enjoyed by a person or body of persons beyond the common advantages of other individuals, the enjoyment of some desirable right, or an exemption from some evil or burden, a private or personal favour enjoyed; a peculiar advantage." It is defined by *Webster* as "a right or immunity not enjoyed by others or by all." In *Bacon's Abr*, vol. 8, p. 158, privilege is said to be "An exemption from some duty, burden, or attendance with which certain persons are indulged. * * * A particular disposition of the law which grants special prerogatives to some persons contrary to common right." *Comyn's Dig.*, says, "*Privilegium est jus singulare, seu lex privata, quæ uni homini vel loco conceditur.*" So, in *Mackeldy's Roman Law*, section 189, it is said, "Privilege in its general sense, denotes every peculiar right or favour granted by the law contrary to the common rule," and in section 190, "The privileged party may exercise it to its full extent and nobody is allowed to disturb him in doing so, hence he has a right to prohibit any other person who is not in the enjoyment of a similar privilege from assuming the same right."

In *Campbell* v. *Spottiswoode*, 3 B & S. 769, the court had before it a case of newspaper libel, which it was claimed for the defence was a privileged communication. Crompton, J., dealing with this, spoke of what is a privileged communication in this way: "That is where from the particular circumstances or position in which a person is placed there is a legal or social duty in the nature of a privilege or peculiar right, as opposed to the rights possessed by the community at large." And Blackburn, J., said, "the meaning of the word is, that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else."

It seems then that rights and privileges, as used in the statute, must mean something special and peculiar, something not common to all the community. To be protected, they must be such as the class of persons seeking protection had, apart from the rest of the community, must be such as they possessed and others did not. That is the construction put upon the words by the court of queen's bench in England, in *Fearon* v. *Mitchell*, L. R. 7 Q. B. 690. Mitchell put up a building on plans submitted to, and approved by the local board, in which, for a number of years, he carried on an extensive business, selling cattle and sheep by auction. The board then set up a public market in the town, and laid an information against him to recover a penalty for selling at his own place and not in the public market, articles on which a toll was by the act authorized to be levied. The justices stated a case for the opinion of the court On the argument, one ground of defence relied on was a proviso in the act, "no market shall be established in pursuance of this section, so as to interfere with any rights, powers or privileges enjoyed within the district by any person, without his consent." The argument was, that Mitchell's premises were built under the express sanction of the local board, with a knowledge of the purpose for which they were to be used, and that by carrying on his business there for years, he had acquired rights, powers and privileges which were protected by that proviso. Cockburn, C J., dealt with that argument thus. "this right which the respondent was enjoying at the time when this market-place was built was not, I think, a right within the meaning of the section. It was a right which he enjoyed only in common with the rest of her majesty's subjects. He had no exclusive right to carry on this business, and he had no greater right than anybody else with suitable premises, for setting up and carrying on a similar business. The word "right," especially when taken in connection with the words "powers or privileges," must mean rights acquired adversely to the rest of the world, and peculiar to the individual. Such a right having been acquired, it is but just that the statute should say that any powers exercised by the local authority, under the section, in setting up a market should not interfere with it; but it could never have been meant that the powers given for the benefit of the inhabitants of the particular district in setting up a market should not be exercised in consequence of some private individual or company having a business of the same description." And Blackburn, J., said: "The respondent had no

right, power or privilege to keep it up against any rival that chose to start, and consequently the local authority had power to set up this market, although it interfered with the respondent's business, which was simply an exercise of the same right as any one of the public had."

In the light of these authorities, I think Roman catholics had no rights or privileges, within the meaning of these words, had they stood alone. But when parliament introduced the term, "by practice," there can, I think, be little doubt, that it intended the words to be used in a wider sense, and had in view what I spoke of as "moral rights." Parliament intended, in fact, that whatever any class of persons was, at the time of the union, with the assent of, or at least without objection from the other members of the community, in the habit or custom of doing, in reference to denominational schools, should continue and should not be prejudicially affected by provincial legislation.

How then did things stand at the time of the union? All the schools were, his grace says, denominational schools, some of them being regulated and controlled by the catholic church and others by various protestant denominations. The means necessary for the support of the Roman catholic schools were supplied to some extent, by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the church, contributed by its members. There can be no doubt that these schools were in the strict sense of the word denominational schools, in which the distinctive doctrines and principles of the Roman catholic church were taught, and naturally Roman catholic parents would send their children to these schools. From there being no other schools, as is placed beyond doubt by the affidavits on both sides, than denominational schools, no schools established by law, it is plain that the general public acquiesced in this state of things They acquiesced in the Roman catholics being, in matters of education, as his grace says: "as a matter of custom and practice separate from the rest of the community" From the circumstance that as education was then carried on they had, in common with every other denomination, a right to establish and maintain schools, and in consequence of their doing so they were, in fact, separate from the rest of the community, but that was not because they had a positive right to be so, —it was merely an incident to their right to have schools.

Now, any right the Roman catholics had, at the time of the union, to establish and maintain schools in which the distinctive doctrines and principles of their church shall be taught, exists still It is in no way interfered with by the public schools act. Any right they had, by custom or practice, to be separate from the rest of the community, in the matter of education they have unimpaired to-day. The public schools act does not prevent them from having their own denominational schools now, if they desire to have them It does not require all the children of the province to attend the schools provided for by the act The Roman catholic church can have schools, and Roman catholic parents can send their children to these schools as fully and as freely as they did at the time of the union In these respects therefore, any rights or privileges the Roman catholics, as a class of persons had, with respect to denominational schools, have not been prejudicially affected.

It is said, however, that Roman catholics were not, at the time of the union compelled to support public schools, they were not taxed for the support of these. True, they were not, but there was then no law which required any person in the country to contribute for school purposes. And, as pointed out by my brother Killam, even this right or privilege, if it can be called one, was not dependent on, or connected with the existence of denominational schools. It cannot be said to have been, either by law or practice, a right or privilege with respect to denominational schools. If the Roman catholics had had no schools, they would have been equally as free from taxation for educational purposes. As stated in the affidavits of Polson and Sutherland, no school taxes were collected by any authority prior to the province entering confederation. The being free from taxation for schools was a right or privilege which they enjoyed only in common with every one else in the province. It was not a right which they enjoyed adversely to the rest of the community, something which they enjoyed beyond the common advantage of other individuals. They are not now, under the public schools act,

subjected to any exceptional tax. They are only subject to the same taxation as the other ratepayers of the country, so how can it be said that in this respect they are prejudicially affected?

It is, however, argued that by the public schools act a system of free schools supported by public funds is set up, and by reason of these, Roman catholic denominational schools are placed at a disadvantage. They are, it is said, exposed to unfair competition, while at the same time by the taxation for the public schools funds, which would have been available for, and appropriated by Roman catholic ratepayers to, the support of their own schools, are diverted from them. But, before the union, any person, or persons, or any class of persons, might at any time, have established and maintained schools, denominational or non-denominational, which would have entered into competition with the Roman catholic schools, and if possessed of the means might have endowed and maintained the schools so begun as free schools. The Roman catholics had no such right or privilege, as to schools, as would have given them the right to prohibit the establishment and maintenance of such schools. If the argument that, by taxation under the public schools act, the ability of the Roman catholics to maintain their own denominational schools is lessened, and so they are prejudicially affected, is used, the same argument may be urged in connection with all taxation for provincial and municipal purposes. By the British North America act the province has the power of taxation for provincial purposes. At the time of the union no taxes of any kind were imposed, the only public revenue of any kind then collected was the customs duty, usually four per cent. All provincial legislation under which taxes are imposed for provincial or municipal purposes, for making and repairing roads and bridges, or any improvements, is equally open to the objection that by reason of it the ability of Roman catholics to maintain their schools has been lessened. Such taxes are all burdens to which they, in common with the other people of the province, were not subject at the time of the union, but to which they, in common with all other ratepayers, are subjected now. This objection, as indeed all the objections urged in favour of the applicant, seems based on the assumption that the schools under the public schools act, are denominational schools. Now, they are nothing of the kind, they are in the strictest sense public non-sectarian schools. The act provides in the 8th section that they shall be entirely non-sectarian, and no religious exercises shall be allowed in them, except as provided in the 6th and 7th sections. By the 7th section religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees it is to be the duty of the teacher to hold such exercises. The religious exercises permitted in any public school are, by section 6, to be conducted according to the regulations of the advisory board The time for them is to be just before the closing hour in the afternoon, and to guard against any possible ground of complaint, it is provided in explicit terms, that, "In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place." That the advisory board will act according to the provisions of the act and see to it that any religious exercises prescribed are strictly non-sectarian must be presumed. If it should, in this matter, fail in its duty, its transgression might be cause of complaint, but its acting directly contrary to the plain provisions of the act could never be used as an argument against the act itself. Such non-sectarian religious exercises, or the total absence of all such exercises, can never make the schools denominational in their character.

In New Brunswick, at the time of confederation, there was no system of separate schools established by law. But the parish schools act then in force declared that the board of education should secure to all children whose parents did not object, the reading of the bible in the schools, and that when read by Roman catholic children, it should, if required by their parents, be in the Douay version, without note or comment. By that enactment there was secured what many consider a great right and privilege, and Roman catholics had secured to them the right, if they required it, that when the bible was read by their children it should be in a particular version. The common schools

act, passed after confederation, had no provision on the subject. Then the board of education made a regulation, that, "It shall be the privilege of every teacher to open and close the daily exercises of the school by reading a portion of Scripture (out of the common or Douay version as he may prefer) and by offering the Lord's prayer—any other prayer may be used by permission of the board of trustees, but no teacher may compel any pupil to be present at those exercises against the wishes of his parents or guardian, expressed in writing to the board of trustees." This was a great change from the provision in the parish schools act, for the right Roman catholics had under it, that a particular version of the bible should be read by their children, if they so desired, was taken away, and the reading of that version or not, made optional with the teacher. It was urged in *Re Renaud*, 1 Pugs., N.B.R. 273, that on this as well as the other grounds, the common school act was *ultra vires*, but the court held it was not so. If it was a right or privilege that existed at the union, certainly the legislature had not protected it by any express enactment, but had it been taken away? If it was a right or privilege, then it would be the duty of the board of education instead of making the regulation they had made, to make one securing just what had been provided for by the parish schools act. The court held that if this was a right or privilege in respect of denominational schools within the protection of sub-section 1 of section 93, of the British North America act, though not protected by the common schools act, it was not taken away, so it could not be said that the right was prejudicially affected.

In this province, at the time of the union, Roman catholics had the right to establish and maintain denominational schools in which the distinctive doctrines and principles of the Roman catholic church were taught. To these schools they had the right to send their children.

As incident to the existence of these denominational schools, they were in the matter of education separate from the rest of the community. They maintained these schools at their own expense. Parents who sent children to them paid fees. But no Roman catholic, as no other person in the province, could be compelled to contribute to the support of denominational schools

Which of these possible rights or privileges has been interfered with, or affected, by the public schools act? It does not enact that there shall be no schools in the province, except those under the act, nor does it provide that the distinctive doctrines and principles of the Roman catholic church shall not be taught in any schools in this province. The Roman catholics may carry on schools since the passing of the act, just as they did at the time of the union. The act does not say that no school fees shall be paid or collected in schools, other than those under this act. The Roman catholics can, just as they did at the union, collect fees from parents sending children to their schools, and maintain their schools in any way they please There is no provision in the public schools act by which any man in the province, Roman catholic or protestant, can be compelled to support denominational schools.

The only change in the situation is, that while at the union no one could be compelled to contribute for the support of schools —not for the support of public non-sectarian schools, for there were none in existence, nor for the denominational which did exist, for there was no law requiring them to be supported. Now, all the property owners in the province, protestants and Roman catholics alike, are compelled to contribute for the support of the public non-sectarian schools.

It is surely a matter of importance for every state that its citizens should be intelligent and educated. Is it not the duty of every state to see there is brought within the reach of all the children in it, the means of acquiring at least an elementary education, such an education as will fit them, when they grow up, to exercise intelligently the duties of citizenship. If it is the duty of the state to do this, and I do not see how it can be doubted, then it is the duty of the state to provide the funds necessary for the purpose. Providing these funds must be a provincial purpose, for which it is, by sub-section 2 of section 92 of the British North America act, in the power of a province to impose taxation within the province. That providing for the education of the people is a provincial duty is also plainly shown by the provision, both in the British North

America act, and in the Manitoba act, that it shall be exclusively within the jurisdiction of the province to make laws on the subject of education. The only limitation on their powers is, that existing rights or privileges by law or practice as to denominational schools shall not be prejudicially affected.

Speaking of the provisions of section 93 of the British North America act, in his report on The New Brunswick common schools act, dated 20th January, 1872, Sir John A. Macdonald, then minister of justice, expressed it as his opinion, that they applied exclusively to the denominational separate or dissentient schools, and did not in any way affect or lessen the powers of provincial legislatures to pass laws respecting the general educational system of the province. The 22nd section of the Manitoba act must receive the same construction. The public schools act, the validity of which is impeached, is an act dealing with the general educational system of this province.

It does not deal with denominational, separate or dissentient schools. Its object is to provide for the general education of the people, to provide public, non-sectarian schools, open to all the people of the province who choose to take advantage of them for the education of their children. I cannot see that any rights or privileges that roman catholics enjoyed at the time of the union as to denominational schools are dealt with or in any way prejudicially affected by the act.

It must, in my opinion, be held that the appeal fails, and that it should be dismissed with costs.

DUBUC, J.

This matter comes before the court by way of motion to reverse the order or decision of my brother Killam, dismissing the summons taken out to quash by-laws nos. 480 and 483, of the city of Winnipeg.

These by-laws were passed by the city council, to levy for municipal and school purposes, a rate of two cents on the dollar, on all rateable property in the said city, being 15$\frac{4}{5}$ mills on the dollar for general municipal purposes, and 4$\frac{1}{5}$ mills on the dollar for school purposes.

The applicant, John Kelley Barrett, asks in his summons to have the said by-laws quashed for illegality, upon the following among other grounds: "Because by the said by-laws the amounts to be levied for school purposes for the protestant and catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum."

The by-laws in question were made in compliance with the provisions of the act respecting public schools, passed at the last session of the provincial legislature, 53 Vic., c. 38, and under the provisions of the municipal act.

The said applicant states in his affidavit that the effect of the said by-laws is that one rate is levied upon all protestant and Roman catholic ratepayers in order to raise the amount required for school purposes, and the result to individual ratepayers is, that each protestant will have to pay less than if he were assessed for protestant schools alone, and each Roman catholic will have to pay more than if he were assessed for Roman catholic schools alone.

This involves the constitutional question, whether the said act respecting public schools is, or is not, *intra vires* of the provincial legislature.

To determine that serious question, it is important to consider what schools were in existence in this country when this province was admitted into the Canadian confederation, and what provisions were made at the time of the union in regard to the matter. It may also be proper to give a brief outline of the laws which, under the provisions of the constitutional acts were enacted by the legislature, were put in operation, and were in force in this province until repealed and replaced by the statute respecting public schools of last session, and to examine the features of the said last mentioned statute.

As stated in the affidavit of his grace the archbishop of St. Boniface, filed on behalf of the applicant, and not denied by the other side, the following state of facts is shown: "2, prior to the passage of the act of the dominion of Canada, passed in the 33rd year of the reign of her majesty Queen Victoria, c. 3, known as the Manitoba act, and

prior to the order-in-council issued in pursuance thereof, there existed in the territory, now constituting the province of Manitoba, a number of effective schools for children; 3, these schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, and others by various protestant denominations, 4, The means necessary for the support of Roman catholic schools were supplied, to some extent, by school fees paid by some of the parents of the children who attended the schools, and the rest were paid out of the funds of the church, contributed by its members; 5, During the period referred to, Roman catholics had no interest in, or control over, the schools of the protestant denominations, and the members of the protestant denominations had no interest in, or control over, the schools of the Roman catholics. There were no public schools in the sense of state schools The members of the Roman catholic church supported the schools of their own church, for the benefit of the Roman catholic children, and were not under obligation to, and did not contribute to the support of any other schools In the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth."

In the following paragraph of his said affidavit, his grace states that the church regards the schools provided for by the public schools act, as unfit for the purpose of educating their children, and the children of Roman catholic parents will not attend such schools, that rather than countenance such schools, Roman catholics will revert to the system in operation previous to the Manitoba act, and will establish, support and maintain schools in accordance with their principles and faith; that protestants are satisfied with the system of education provided for by the said the public schools act, and are perfectly willing to send their children to the schools established and provided for by the said act, such schools are, in fact, similar in all respects to the schools maintained by the protestants under the legislation in force immediately prior to the passage of the said act, etc., etc.

The affidavits filed in opposition to the motion state that schools which existed prior to the province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority, and there were no means by which any persons could be forced by law to support any of the said private schools.

As stated by my brother Killam, these affidavits are in no way contradictory to or inconsistent with the statements made by his grace.

In his affidavit, also filed herein. Reverend Professor Bryce gives his views as to what were the opinions of the presbyterians of this province in the years immediately succeeding the entrance of Manitoba into confederation; but as he only came into this country in 1871, one year after, he does not pretend to contradict any of the statements made by the archbishop of St. Boniface on what was the position of affairs in regard to the denominational schools, either Roman catholic or protestant then existing.

So it remains established that the schools then in operation, although there was no law to give them legal sanction, were *de facto*, i. e., in practice, denominational schools.

The provisions of law in regard to schools, made applicable to Manitoba at the union, were the 93rd section of the British North America act, and the 22nd section of the Manitoba act

Under the said provisions of our constitution, the provincial legislature, at its first session, in 1871, passed an "act to establish a system of education in this province." By the said act, the lieutenant-governor-in-council was empowered to appoint not less than ten, nor more than fourteen persons, to be a board of education for the province, of whom one-half were to be protestants, and the other half catholics; also one superintendent of protestant schools and one superintendent of catholic schools, who were joint secretaries of the board.

The duties of the board were described as follows: "1st. To make from time to time such regulations as they may think fit for the general organization of the common schools; 2nd. To select books, maps, and globes to be used in the common schools, due

regard being had in such selection to the choice of English books, maps and globes for the English schools, and French for the French schools, but the authority hereby given is not to extend to the selection of books having reference to religion or morals, the selection of such being regulated by a subsequent clause of this act; 3rd. To alter and sub-divide, with the sanction of the lieutenant-governor-in-council, any school district established by this act."

The general board was divided into two sections, and among the duties of each section, we find the following: "Each section shall have under its control and management the discipline of the schools of the section, it shall make rules and regulations for the examination, grading and licensing of teachers, and for the withdrawal of licenses on sufficient cause; it shall prescribe such of the books to be used in the schools of the section as have reference to religion or morals"

By section 13, the monies appropriated to education by the legislature were to be divided equally, one moiety thereof to the support of protestant schools, the other moiety to the support of catholic schools.

The first board appointed by the lieutenant-governor-in-council, was composed of the bishop of St. Boniface, the bishop of Rupert's Land, several catholic priests, several protestant clergymen of various denominations, and a couple of laymen for each section.

The said statute was amended from time to time, as the country was becoming more settled, and new exigencies arose. But the same system prevailed until the act of last session, the only substantial amendments were that, in 1875, the board was increased to twenty-one, twelve protestants and nine Roman catholics, and the monies voted by the legislature were to be divided between protestants and catholics in proportion to the number of children of school age in the respective protestant and catholic districts.

The more noticeable change in the system was that the denominational distinction between the catholics and protestants, and the independent working of the two sections, became more and more pronounced under the different statutes afterwards passed. Section 27, of the act of 1875, c. 27, says, that the establishment of a school district of one denomination shall not prevent the establishment of a school district of the other denomination in the same place.

The same principle is carried out and somewhat extended by sections 39, 40, and 41, of the act of 1876, c. 1.

In 1877, by c. 12, s. 10, it was enacted that in "no case a protestant ratepayer shall be obliged to pay for a catholic school, and a catholic ratepayer for a protestant school."

So it is manifest that, until the act of last session, the school system created by the provincial legislature, under the provisions of the constitutional act, was entirely based and carried on, on the denomination principle, as divided between protestant and Roman catholic schools.

At the last session of the legislature, two acts were passed in respect of education. The first one, c. 37, abolishes the board of education heretofore existing, and the office of superintendent of education, and creates a department of education which is to consist of the executive council or a committee thereof, appointed by the lieutenant-governor-in-council, and also an advisory board composed of seven members, four of whom are to be appointed by the department of education, two by the teachers of the province, and one by the university council. Among the duties of the advisory board is the power "To examine and authorize text books and books of reference for the use of the pupils and school libraries; to determine the qualification of teachers and inspectors for high and public schools; to appoint examiners for the purpose of preparing examination papers: to prescribe the form of religious excercises to be used in schools."

The next act is, the public schools act, c. 38. It repeals all former statutes relating to education. It enacts, amongst other things, as follows: section 3, "All protestant and catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments and rate bills heretofore duly made in relation to protestant or catholic schools, and existing when this act comes into force,

shall be subject to the provisions of this act." Section 4, "The term for which each school trustee holds office at the time this act takes effect shall continue as if such term had been created by virtue of an election under this act." Section 5, "All public schools shall be free schools, and every person in rural municipalities between the age of five and sixteen years, and in cities, towns and villages, between the age of six and sixteen, shall have the right to attend some school." Section 6, "Religious exercises in public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place." Section 7, "Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees, it shall be the duty of the teacher to hold such religious exercises." Section 8, "The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

It provides for the formation, alteration, and union of school districts in rural municipalities, and in cities, towns or villages, the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes.

Section 92 enacts that "the municipal council of every city, town and village shall levy and collect upon the taxable property within the municipality in the manner provided in this Act and in the municipal and assessment acts, such sum as may be required by the public school trustees for school purposes."

Section 108, which provides for the legislative grant to schools, has the following sub-section, "(3) Any school not conducted according to all the provisions of this, or any act in force for the time being, or the regulations of the department of education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant." By section 143, "No teacher shall use or permit to be used as text books, any books in a model or public school, except such as are authorized by the advisory board, and no portion of the legislative grant shall be paid to any school in which unauthorized books are used." By section 179, "In cases where, before the coming into force of this act, catholic school districts have been established as in the next preceding section mentioned *(that is, covering the same territory as any protestant district)*, such catholic school district shall, upon the coming into force of this act, cease to exist, and all the assets of such catholic school district shall belong to, and all the liabilities thereof be paid by the public school district."

It is easy to see from the above that the new act makes a complete change in the system. The denominational division of catholics and protestants is entirely done away with, and by section 179, where, as in this case, a catholic school district is supposed to cover the same territory as any protestant school district, the said catholic school district is not only wiped out, but its property and assets are vested in, and belong to the other school district, which under the act becomes the public school district.

Let us see now what are the provisions of the British North America act and of the Manitoba act applying to the case. Section 93 of the British North America act enacts, that, "In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union."

The first sub-section of section 22, of the Manitoba act, is substantially the same, the only difference being in the addition of the words, "or practice" which makes it read thus: (1) "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union."

The whole question to be determined in this case turns upon the construction of the words "or practice" added to the provision of the Manitoba act.

The rules of construction of statutes as laid down by the authorities, are well known. Though all based on the strict principles of justice, they, in their application

offer some distinction and some apparent differences, in order to meet the numerous exigencies of the various cases under consideration. One rule, perfectly sound as applicable to a particular case, under a particular set of circumstances, might be unjust and unfair if applied to another case with different circumstances. Per Lord Blackburn in *Edinburg Street Tramways Co.* v. *Torbain*, 3 App. Cas. 68.

One of the first elementary rules is, that when the words of the statute admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature as to construe an act according to its own notions of what ought to have been enacted *Maxwell on Statutes*, 6 , *R.* v. *York and North Midland Railway Co.*, 1 E. & B 858.

When the language is precise and unambiguous, but at the same time incapable of reasonable meaning, and the act is consequently inoperative, a court is not at liberty to give the words, on mere conjectural grounds, a meaning which does not belong to them. *Maxwell on Statutes*, 23.

But the above rule is confined to cases where the language is precise and capable of but one construction.

If the words, "or practice," inserted in the Manitoba act, were as clear and unambiguous as to admit of but one construction, the above rule would have to be applied, and there would be no use for prosecuting the enquiry any further. But such is not the case. They are said to mean that the roman catholics, while compelled to contribute to the support of public schools, are by said words, allowed to have and maintain their denominational schools as private schools ; this is the narrower construction. They are also alleged to secure to catholics the privilege of being exempted from compulsory attendance at the public schools , another and more liberal construction is that the denominational schools, existing as a matter of fact at the time of the union, were given by these words, a legal *status*, so that they coul not afterwards be interfered with by the provincial legislature.

As seen by these different interpretations, the words "or practice' are susceptible of more than one construction ; another rule then has to be applied.

An old rule of construction says that a thing which is within the letter of the statute is not within the statute, unless it be also within the meaning of the legislature. *Maxwell*, 24 ; *Bacon's Abrid. Statute*, (1), 5.

As stated by *Maxwell* at p. 27, "to arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. It is necessary, according to Lord Coke, to consider. 1. What was the law before the act was passed ; 2. What was the mischief or defect for which the law had not provided ; 3. What remedy parliament has appointed ; and 4 The reason of the remedy." That rule was laid down in *Heydon's Case*, 3 rep. 7, decided as late back as during the reign of Elizabeth, and has been followed ever since

In order to find out the exact and true meaning of certain words contained in a statute, it becomes sometimes important to go into the history of the matter and examine ths external circumstances which led to the enactment in question.

In *River Wear Commissioners* v *Adamson*, 2 app. cas., Lord Blackburn says at p. 756 : "I shall state as precisely as I can what I understand from the decided cases, to be the principles on which the courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the interpretation of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from the circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used."

"In the interpretation of statutes," says Maxwell, at p. 30, citing *Graham* v *Bishop of Exeter*, rep. by Moore 462, "the interpreter, in order to understand the subject matter, and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided, that is, he must call to his aid all those external or historical facts which are necessary for this purpose, and which

led to the enactment, and for these he may consult contemporary or other authentic works and writings."

In *Attorney-General* v. *Sillem*, 2 H. & C., Lord Bramwell expressed the same view when he said at p 529 · "It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it, and so, perhaps history may be referred to to show what facts existed bringing about a statute, and what matters influenced men's minds when it was made."

Similar language was used by L. J. Turner in *Hawkins* v. *Gathercole*, 6 De G., M. & G. 1. He says at p p. 20 and 21. In construing acts of parliament, the words which are used are not alone to be regarded Regard must also be had to the intent and meaning of the legislature. The rule upon the subject is well expressed in the case of *Stradling* v *Morgan*, *Plowd*, 204; and also in *Eyston* v *Studd*, *Plowd*, 467:-"

In determining the question before us, we have, therefore, to consider not merely the words of the act of parliament, but the intent of the legislature to be collected from the cause and necessity of the act being made from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

In *Holme* v *Guy*, 5 Ch. D 905, Jessel, M.R., said: "The court is not oblivious of the history of law and legislation Although the court is not at liberty to construe an act of parliament by the motives which influenced the legislature, yet, when the history of law and legislation tells the court what the object of the legislature was, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view of extending it to something that was not intended."

In the light of those authorities, it becomes necessary in trying to determine the true meaning of the words "or practice," in the Manitoba act, to examine under what circumstances these words were introduced into the statute, and the grounds, if they can be ascertained, on which they were inserted.

The 93rd section of the British North America act gives to the legislature of each province the exclusive power to make laws in relation to education, subject however, to certain restrictions, the first of which says that nothing in any such law shall prejudicially affect any right or privilege which any class of persons have by law, etc. The first sub-section of the 22nd section of the Manitoba act says: " .. .which any class of persons have by law or practice," etc.

Why were these words "or practice" introduced? What was intended by said words? The true meaning intended by the legislature can only be ascertained by examining the historical facts and circumstances connected with the school question, which led to the provisions of the 93rd section of the British North America act, and the 22nd section of the Manitoba act being enacted.

When the four provinces of Ontario, Quebec, Nova Scotia and New Brunswick joined in the confederation scheme, each of these provinces was already fully organized and had a system of public schools, established by law In Ontario and Quebec, the law authorized dissentient or separate schools of a denominational character, in localities where the minority had a religious belief different from the creed of the majority. The minorities, in establishing separate or dissentient schools, were exempt from taxation for the support of public schools, and were allowed a proportionate share of the legislative grant. The systems in Ontario and in Quebec were not exactly the same, but they had some common features embodying the principle of denominational schools.

In Upper Canada the question of separate schools had been the subject of a long and bitter struggle between protestants and catholics, but the matter had been finally settled by the school act of 1863.

In Nova Scotia and New Brunswick, it appears that the Roman catholic minorities had in practice their own schools under the common or parish school laws; but the said schools were not recognized by law as such denominational schools, and the catholics had no right or privilege by law in respect of denominational schools.

In framing the British North America act, the fathers of confederation, in order to guard the populations of the different provinces against the agitation and turmoil

which had been raised on that question between catholics and protestants in the old province of Canada, while conceding and asserting the principle that each of the provinces might exclusively make laws in relation to education, thought proper to protect the religious feelings, and secure the right and privilege of the minorities on that subject, by enacting the limitations found in the sub-sections of the 93rd section. These limitations were to apply to new provinces entering confederation as well as to the four original provinces.

The extent of the limitations imposed on provincial legislatures by the said provisions, was first raised and questioned in New Brunswick. The law relating to the subject, at the time of the union, was the parish schools act of 1858. In 1871, the legislature of New Brunswick passed an act relating to common schools, to which the Roman catholics of the province had very strong objections. Petitions were sent to the provincial legislature, and afterwards to the dominion authorities, against the coming into effect of the act. The matter was taken before the Supreme Court of New Brunswick, in *ex-parte Renaud*, reported in 2 *Cartwr. cas.*, 465, and an elaborate judgment was pronounced in the case by the court. The court decided in effect, that the catholics of New Brunswick had not *by law* at the union, any right or privilege in respect to denominational or separate schools. In dealing with the question, the court insists on the fact that the catholics had no rights or privileges by law, which were the only rights or privileges contemplated and secured by the first sub-section of the 93rd section of the act. The expression "legal right or privilege" is almost constantly used. In the course of the judgment, Chief Justice Ritchie, now chief justice of the supreme court of Canada, speaking for the majority of the court, said "Where is there any thing that can, with propriety, be termed a legal right? Surely the legislature must have intended to deal with legal rights and privileges. How is it to be defined? How enforced?" And elsewhere. "If the Roman catholics had no legal rights, as a class, to claim any control over, or to insist that the doctrines of their church should be taught in all or any schools under the parish schools act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that, as a class of persons they have been prejudicially affected in any legal right or privilege with respect to 'denominational schools' construing those words, in their ordinary meaning, because under the common schools act, 1871, it is provided that the schools shall be non-sectarian?"

From the above quotations, where *legal* rights only are considered and dealt with, and from the other arguments advanced and expressions used, it may fairly be inferred that, if the Roman catholics of New Brunswick, instead of having only their right and privilege *by law* secured by the statute, they had had their right and privilege *by practice* equally secured, the judgment of the court might have been different.

As to the point raised on the argument by Mr. Ewart, of counsel for the applicant, that the words "or practice" were likely inserted in the Manitoba act to remedy the defect which caused the difficulties in New Brunswick, which point was answered by the attorney-general, that such could not be the case, because the New Brunswick common schools act was passed only in 1871, one year after the Manitoba act, this, at least, may be said: it appears from the journals of the legislative assembly of New Brunswick that the bill relating to common schools was introduced and put through the house of assembly by the Hon. Geo. A. King, attorney-general of the province, in 1871, that the same Hon. Geo. A. King had, in 1869, introduced in the legislative assembly a similar bill, which had been read a first time; that the same Hon. Geo. A. King, did, on the 24th of February, 1870, introduce a similar bill which was read a first and second time, referred to the committee of the whole, and considered and discussed in four distinct sittings of the said committee of the whole, on the 17th March, 22nd March, 31st March, and 1st April. That bill provided that it was not to come into operation for one year after the passage thereof.

The Manitoba act passed by the dominion parliament, did not become law until the 12th of May of the same year. It was not introduced into the house until the second day of May, more than a month after the discussion in the legislature of New

Brunswick of the common schools bill in question. Is it not therefore reasonable to infer and presume that the discussion which took place in the legislative assembly of New Brunswick at the different sittings held on said school bill in question were, as usual, reported and criticized in the public press, and that such reports and criticisms came to the knowledge of members of the dominion government and other persons who had something to do with the framing of the Manitoba act? This most natural inference becomes, under the circumstances, such a presumption as not to be neglected in the construction of the words in question Presumptions are constantly used in determining the real intent and meaning of statutes.

We have the fact that, when the Manitoba act was passed, there were denominational schools in this country, and the further fact that there was no law to protect in their privilege the minorities of the future, either catholic or protestant, who might wish the continuance of said denominational schools. These facts, we must assume, were well known to the legislators. If the province had entered confederation with no other protection to minorities, with respect to denominational schools, than the first sub-section of the 93rd section of The British North America act, as there was no law in the country with respect to denominational schools, or even to any kind of schools, the first sub-section of the 93rd section, or its re-enactment without modification in the Manitoba act, would have remained a dead letter. As there was no law, there was no right or privilege by law to be protected. The Roman catholics of this province were even in a worse position than those of New Brunswick, because there, as seen by the judgment of the supreme court of that province already referred to, the catholics had, under the parish schools act of 1858, numbers of schools in which, as a matter of fact, the doctrines of their church were taught, though the parish schools act did not confer on them, as a class, any right or privilege with respect to denominational schools. This position of affairs must have impressed the men who framed the Manitoba act, and shows conclusively to my mind that the words, "or practice," were inserted in the Manitoba act for only one and very manifest purpose, that is, to protect in their right and privilege, as to denominational schools, the catholics or protestants who might in the future find themselves in the minority in this province.

We must not overlook the fact that it was considered, and well known at the time, that the protestants and catholics were in about equal numbers in the province. That proposition is sufficiently established by the fact that the first school act passed by the Manitoba legislature in 1871 provided that an equal number of protestants and catholics were to be appointed as members of the board of education, and that the monies voted by the legislature should be equally divided, one half to be appropriated for the support of protestant schools, and the other half for the support of catholic schools.

Another fact not to be left unnoticed is that Manitoba was the only province entering confederation after the original union for which the provisions of the 93rd section of the British North America act were departed from and modified. Nothing of the kind is found in the terms made with British Columbia and Prince Edward Island when they entered confederation in 1871 and 1873. Why was that departure from the provisions of the British North America act made in regard to denominational schools for Manitoba only? Undoubtedly because it was well known that the population of this province was equally divided between the protestants and Roman catholics, and that there was already by practice, in the country, denominational schools, which the legislature intended to protect and insure permanently to any class of persons, either protestants or catholics, who might desire to continue in the enjoyment of that privilege. That accounts for the insertion of the two words "or practice" in the Manitoba act.

Before examining more fully what is the true and real purport of the words "or practice," as applying to the right and privilege in question, it may be convenient to consider what is a right and what is a privilege. A right is a just claim; a legal title; something positive, which can be enforced by law. A privilege is sometimes also a direct advantage or benefit; but it is often considered more as of a negative character,

such as an immunity, an exemption from some burden, beyond the common advantage of other individuals. So, the words "right" and "privilege" are technical words, having by themselves well defined legal meanings

The same cannot be said of the word "practice," in the sense in which it is used in this sub-section. It is not a technical legal word, and it has no particular legal meaning. It is not found in any such sense in law dictionaries. It is only an ordinary popular word to be construed in its ordinary popular sense. It means custom or habit, use or usage. In the sub-section in question, it qualifies the words "right" and "privilege." "Privilege by law" may be considered a technical expression, to be construed according to its technical meaning. But "privilege by practice" becomes an ordinary popular expression to be interpreted in its popular sense.

"The words of a statute," says *Maxwell*, at p. 67, "are to be understood in the sense in which they best harmonize with the subject of the enactment and the object in view."

In *Jessen* v. *Wright*, 2 Bligh., Lord Redesdale says at p. 56, "That the general intent shall overrule the particular is not the most accurate expression of the principle of decisions. The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise" The above was quoted approvingly by Lord Wensleydale in *Roddy* v *Fitzgerald*, 8 H. L. 877.

In *The Fusilier*, 34 L. J. P. M & A. 27, the words "persons belonging to the ship," in the merchant shipping act, 1854, were, in matter of reward for salvage, construed to apply to passengers as well as to the crew. "As to the words, 'belonging to such ship,'" says Dr. Lushington, "'belonging' is certainly a word *ancipitis usus* with reference to the subject matter, but one of the rules of construing statutes, and a wise rule too, is that they shall be construed *uti loquitur vulgus*, that is, according to the common understanding and acceptation of the terms, and I think that nothing is more common than to say of passengers by a ship that they are persons belonging to the ship, and would be included under the expression "persons."

In this case, the expression "privilege by practice" must be construed in its popular sense, having always in sight the object which the legislature had in view when they were dealing with limitations to the power of the provincial legislature in regard to schools, and when they knew that certain classes of persons had by practice, i. e, by custom and usage, denominational schools which were sought to be protected. That construction "harmonizes best with the object which the legislature had in view."

The mere change of a word in a similar statute for another word of the same purport, or the addition of one or more words of the same purport as the word already used, does not always show an intention of the legislature to have it operate as a change or alteration of the meaning. But it is not so here. The words, "by law," and "by practice," cannot be considered as of the same purport The addition of the words "or practice," show clearly an intention of the legislature to give an entirely new meaning to the provision, and to add something to the limitation already imposed on the provincial legislature, in order to make it apply to, and provide for, the case under consideration. What is then the true meaning intended by the legislature in inserting those words?

It is contended that very little importance should be attached to the words. It cannot, however, be supposed that they were placed there fortuitously, unmeaningly, on the speculative chance that they might fit some hypothetical unknown state of things. The position of denominational schools then existing by practice, was known by the framers of the act through the delegates sent from this country to negotiate and arrange with the dominion authorities the terms on which the new province would enter confederation. In the course of those negotiations, the provisions respecting schools, to be inserted in the act, must have been fully discussed Those words were therefore inserted advisedly to secure to those interested the permanency of denominational schools enjoyed at the time by practice, but not recognized by law. This must have been the privilege by practice meant by the provision.

The adverse contention is, that the only privilege enjoyed by Roman catholics before the union, and secured by the words, "by practice," was the privilege of having

denominational schools sustained by themselves as private schools, and that, under the new school law, they may have the same privilege still. The privilege of being taxed for the support of schools from which according to their conscience and to the principles of their faith, they could derive no benefit, and of taxing themselves besides for the only schools to which they could conscientiously send their children, would be a very strange privilege indeed. Let us see whether such could have been the intention of the legislature in adding the words "or practice" in the Manitoba act.

Strictly speaking, the legislature has, within the scope of its jurisdiction, the unlimited power to make any, even unjust or absurd, enactments. But, at the same time, it is never contemplated that in civilized modern countries a legislature would disregard and set at naught the well known principles of natural justice and equity. The right of any persons or class of persons to have and support private schools is a primordial right, as the right to breath air or eat bread. Supposing the legislature of a province, having full power to do so, would pass a public school act with compulsory attendance, which all ratepayers would be bound to support, that would not affect the natural right of a citizen to teach his own children in his own house, before school time in the morning, between school hours in the middle of the day, or after the closing of the public school in the afternoon, and so to have and conduct a private school in his own premises Nothing even would prevent him from having his neighbour's children attending such teaching, or having such teaching done by his daughter, or any other person. This would be a private school which no one would by law be bound to support, a school of the same nature as those stated to exist before the union Such a natural right does not want any legislation to protect it. Can we, therefore, suppose that the only thing which was aimed at and intended by the dominion parliament in adding the the words "by practice" was to protect and insure to the minority of the future the natural right to have such schools? Can we, reasonably, assume that the federal parliament, anticipating and fearing that the Manitoba legislature might, against all natural justice and fairness, deprive a whole class of persons of such primordial right, inserted the words "or practice" for the only purpose of guarding and protecting the minority that might be, against such unjust and oppressive legislation? That surely could not have been anticipated, and the enactment could not have been intended to prevent such imaginary mischief.

In *R. v. Skeen* case, Bell 115, Lord Campbell said, "When by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the legislature, we must enforce it, although in our opinion it may be absurd or mischievous. But if the language employed admit of two constructions, and according to one of them the enactment would be absurd or mischievous, and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the legislature intended." A similar view was expressed by Parke, B., in *Beck v. Smith*, 1 M. & W., 195, where he held that, when the grammatical construction of the words used would lead to any manifest absurdity or inconvenience, the language may be varied or modified so as to avoid such inconvenience.

But, as it may be further objected on this point, as the legislature has the power to pass statutes to establish a state church, to prescribe an oath of supremacy objectionable to Roman catholics, to disfranchise or create other disabilities affecting them, why was there no provision made to protect them against such contingencies? The reason is obvious, because it was confidently and rightly understood and taken for granted that the people on whom a constitution based on the representative system, was being conferred, were civilized and reasonable enough not to wantonly depart, on these questions, from the broad and equitable principles prevailing in modern British and other civilized constitutional institutions. A constitution assumes a certain number of general principles, and is not supposed to provide for every minor detail of having its provisions carried out. As to schools, however, the question had very properly to be looked upon in a different light. The experience of the past had taught a profitable lesson; the difficulties and controversies which had arisen before on that question in Ontario, Quebec, and other centres of mixed population, the strong prejudices by which certain persons and

certain classes were liable to be carried on that point, engendering the most bitter feelings in communities otherwise living harmoniously together, must have shown to the legislators that this was a live and burning question to be settled and provided for, and influenced them to protect the new province against the trouble and agitation experienced over it elsewhere.

If, as I have stated, by being narrowly construed to protect only private schools which need no protection, the words "or practice" would be a superfluous and meaningless enactment, they must have some other meaning. By carefully considering all the circumstances which led to their being inserted in the Manitoba act, it appears to me most evident that the dominion legislature, knowing that there were effective denominational schools in the country, knowing also that there being no law to authorize them, the right or privilege to have them maintained would not be secured after the union by the provisions of the British North America act, clearly intended to give legal sanction to the privilege enjoyed by practice.

To the contention that the new school law does not interfere with the privilege of any class of persons to have still denominational schools, as private schools, the Roman catholics can justly say If the new act does not take from us the right of having our schools, it deprives us of the privilege of subscribing exclusively for our own schools. Prior to the union, the Roman catholics had the positive right of having their own denominational schools; they had, besides the negative right, that is, the privilege of not being compelled to support other schools. They had that right and privilege as a matter of fact, and the words "or practice" were inserted to prevent their being interfered with under the new constitution.

Besides considering the historical facts and circumstances bearing upon a statute to ascertain its real sense, another mode of determining its true meaning is to examine its different parts, and even parts of other acts on the same subject As stated by Lord Mansfield in *R.* v. *Loxdale*, 1 Burr. p. 447, "when there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other."

According to L. J. Turner, in *Hawkins* v. *Gathercole*, already cited, the court has to consider not only the words of the act of parliament, but the intent of the legislature, to be collected from the cause and necessity of the act being made, from a comparison of its several parts, and from foreign circumstances, so far as they can justly be considered to throw light upon the subject.

So far, I have dealt only with the first sub-section of the 93rd section of the British North America act, and the corresponding sub-section in the Manitoba act.

The 2nd sub-section of the said 93rd section of the British North America act extends to the dissentient schools of the protestants and Roman catholics of Quebec, the powers, privileges and duties conferred and imposed by law at the union on the separate schools and school trustees of the Roman catholics in upper Canada.

By the 3rd sub-section it is enacted that: "Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the governor general in council from any act or decision of any provincial authority affecting any right or privilege of the protestant or catholic minority of the queen's subjects in relation to education."

The 4th sub-section provides for remedial laws to be made by the parliament of Canada for the due execution of the provision of that section and of any decision of the governor-general-in-council, as the circumstances of each case may require, on an appeal being made for that purpose. Of these provisions the first sub-section is reproduced in the Manitaba act with the addition of the words "or practice." Sub-section 2 is omitted. Sub-section 3 is re-enacted in an altered form; the first three lines are omitted, and the appeal is allowed, not only from any act or decision of any provincial authority, but also from any act or decision of the legislature of the province. Sub-section 4 is inserted *verbatim*. Sub-sections 2 and 3 of section 22 of the Manitoba act correspond to sub-sections 3 and 4 of section 93 of the British North America act.

In this case, we have nothing to do with the appeal provided for by the two last mentioned sub-sections. But we are entitled to consider them if they can throw any light on the meaning of the first sub-section.

The first sub-section speaks of any right or privilege with respect to denominational schools, the second subsection gives an appeal from any act or decision of the legislature, or of any provincial authority, affecting any right or privilege of the protestant or Roman catholic minority in relation to education. If the minority, either protestant or catholic, had any right or privilege in relation to education, it must be a right or privilege in regard to their own respective schools, that is, their own denominational schools. Why should there be an appeal to protect their right or privilege, if they had none? The appeal must have been provided because the dominion legislature meant and intended that the denominational schools which protestants as a class, and Roman catholics as a class, had by practice at the union, were to have a legal recognition under the Manitoba act, and, as such were to be protected against any act of the provincial legislature as well as against any act or decision of any provincial authority. The meaning which, I have held, should be given to the words "or practice," is thus explained and confirmed by reference to the other provisions of section 22 of the Manitoba act, and the corresponding provisions of the 93rd section of the British North America act. As already mentioned, there was no reason to re-enact, in the Manitoba act, any of the provisions of the 93rd section in relation to denominational schools, and in relation to appeals by minorities, if there was no such privilege already existing by practice which was intended to be recognized by law under the new constitution.

An objection made against the claim of the applicant is, that if the Roman catholics are entitled to be secured in the continuance of the denominational schools, the other various denominations of protestants would have the same privilege. I do not see that this is an objection at all. The provision speaks of any class of persons having by law or practice any right or privilege with respect to denominational schools. As it is established that the schools existing at the union were denominational schools, respectively controlled by the Roman catholics and by the various protestant denominations, I see no reason to doubt that, if the first sub-section of the 22nd section of the Manitoba act is to be taken alone and independently of the other sub-sections the adherents of the English church, the presbyterians, the episcopalians, and any other denominations of protestants who had by practice denominational schools at the time, would be entitled, under this provision, to keep and maintain them as such. That is one aspect of the question.

The other aspect appears when we look at the other sub-sections in the British North America act, and in the Manitoba act. Christians who, for centuries have been in all christendom divided into two great classes, Roman catholics and protestants, and designated as such, are also in the above-mentioned sub-sections, for the purpose of denominational schools, divided and designated as Roman catholics and protestants. It being an elementary rule that construction of a statute is to be made of all its parts together, and not of one part only, we must look to these different provisions applying to the subject matter, and, in doing so, we are led to the conclusion that the legislature, in speaking of any class of persons in respect of denominational schools, intended to refer to the Roman catholics as a body, and to protestants as a body, and to apply the protection to either one or the other who might happen to be in the minority.

It is also said that the only privilege secured to the Roman catholics by the words "or practice," is the right to exempt from compulsory attendance at the public schools which might be established. But there was no such thing here at the time as public schools, in the sense of state schools, and no such thing as compulsory attendance. That question of compulsory attendance was not in issue between protestants and catholics, or between particular denominations of protestants. That question could not have been contemplated in the limitation clause of the Manitoba act, as securing the right or privilege of any class or body of christians against the probable tendencies of any other christian body who might thereafter find themselves in the majority. The words, there-

fore, were not inserted to prevent a wrong, or remedy an evil which did not exist, was not foreseen, and was not apprehended, because it was not in issue.

On the argument, it was contended by the attorney general that, if the catholics have by the first sub-section in the Manitoba act, the privilege of being exempt from contributing to the support of any other but their own denominational schools, the provincial legislature would be deprived of the power to pass any effective school law, because the persons who had no children and had not to pay for any schools before the union, would claim that the privilege heretofore enjoyed by them from being taxed to support any schools, would be prejudicially affected. The objection is not a serious one. The law deals with classes, not individuals The provision was made to protect the rights and privilege which any class of persons had with respect to denominational schools, not the claim or privilege of individuals who happened not to support any school.

It was also urged by the attorney general that, if the dominion parliament had intended to secure to the catholics of the province the right to have their own denominational schools as in Ontario and Quebec, why was not a special provision in regard to it put in the Manitoba act, similar to the 2nd sub-section of the 93rd section of the British North America act. And he argues that the omission shows that there was no such intention. In the first place, that sub-section is a positive provision extending to the dissentient schools in Quebec the powers, privileges and duties which the catholics of Ontario had by law before the union in regard to separate schools. There were no such schools existing by law in this country at the time. In the second place, the question may be satisfactorily answered by its being thus retorted · If the dominion parliament did not intend to secure to the Roman catholics the right and privilege enjoyed by them at the union with regard to denominational schools, why were the principal provisions of the 93rd section of the British North America act re-enacted in the Manitoba act, and why were such provisions amended by extending further and increasing the limitations already imposed on provincial legislatures? If parliament had no such intention, the British North America act was quite sufficient. There was no necessity and no use for re-enacting its provisions and extending the limitation clause already existing.

Reverting to the interpretation of statutes susceptible of more than one construction, it is an elementary rule that the construction which appears more just and more reasonable will be adopted.

In *Regina* v. *Monk*, 2 Q.B.D. 555, Brett, L. J., said that "when a statute is capable of two constructions, one of which will work a manifest injustice, and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice." Lord Blackburn expressed the same view in *Rothes* v *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 702, when he said, "I quite agree that no court is entitled to depart from the intention of the legislature as appearing from the words of the act, because it is thought unreasonable, but when two constructions are open, the court may adopt the more reasonable of the two."

In some cases, when the occasion justifies it, the court goes so far as to modify the language of the enactment, or add to it, in order to give it a reasonable construction.

In *Hollingworth* v. *Palmer*, 4 Ex 267, Parke, B., after reading section 16 of 7 & 8 Vic., c. 112, which was to be construed, said at p. 281 · "This section is certainly most incorrectly worded, and it is, therefore, necessary to modify its language in order to give it a reasonable construction. The rule we have always followed of late years is to construe statutes, like all other written instruments, according to the ordinary grammatical sense of the words used, and if they appear contrary to, or irreconcilable with, the expressed intention of the legislature, or involve any absurdity or any inconsistency in their provisions, they must be modified so as to obviate that inconvenience, and no further."

In *Tennant* v. *Howatson*, 13 App. Cas. 489, the words, "Nothing contained in this ordinance," were held to mean "Nothing contained in the two preceding sections of this ordinance."

In this case, however, we have not to resort to any such modification of the language of the enactment, nor to any addition thereto. In construing the provision

questioned, which provision is clearly susceptible of more than one construction, it is not difficult to see which construction is more reasonable and more conducive to justice. The Roman catholics had by practice denominational schools before the union; during nineteen years since the union, and until the new school act was passed, they had said denominational schools recognized and authorized by law. They declare, under the oath of the archbishop of St. Boniface, the head of their church in this province, that, on the principle of their religious belief, and on the ground of conscience, they consider the schools provided for by the new schools act, not fit for the purpose of educating their children, and that their said children will not attend said schools, that rather than countenance such schools, they will have to establish, support, and maintain schools in accordance with their principles and faith.

If the narrower construction of the provision in question is adopted, they will have to tax themselves to support their own schools, the only schools which in conscience they can send their children to, and they will have, besides, to be taxed and to pay for the support of the other schools, schools from which the non-catholics will derive all benefit, and the catholics themselves no benefit whatever. Moreover, the legislative grant, which is the people's money, contributed by catholic as well as by other citizens, will be exclusively devoted to assist the other schools, while the catholics will not get their proportionate share to maintain their own schools. Would not that be most unreasonable and a great injustice to the Roman catholics, while the other portion of the community would get more than naturally they would be reasonably and justly entitled to? Now, if the broader and more equitable construction prevail, the Roman catholics, in being allowed to have their schools maintained and recognized by law, would get nothing more than strict and fair justice, and the non-catholics would suffer no injustice.

Protestants and catholics have different views and different principles as to the education which children should receive in elementary schools. Some protestants are adverse to any religious teaching in public schools, and hold that such teaching should be purely secular; others, and, I think, a larger proportion of them, are desirous that the general principles of christianity be taught, and that there should be some scriptural reading, and other exercises of a religious character. As to Roman catholics, they go farther. While believing that the teaching of secular subjects required by the state should be given due consideration, and full effect, they hold, as a matter of conscience, based on the principles of their faith, that their children should also be taught in the doctrines and tenets of their church, and that the religious exercises should be those of the Roman catholic church, and no other.

As stated by the archbishop of St. Boniface in his affidavit filed, "protestants are satisfied with the system of education provided for by the public schools act, and are perfectly willing to send their children to the schools established and provided for by the said act. Such schools are, in fact, similar to the schools maintained by the protestants under the legislation in force immediately prior to the passage of the said act." The archbishop is, in that, substantially corroborated by the Reverend Professor Bryce who says, in his affidavit filed, that the presbyterians are able to unite with their fellow-christians of other churches in having taught in the public schools (which they desire to be taught by christian teachers) the subjects of secular education. It is easy to understand why the various denominations of protestants can unite in a common system of public schools, and why Roman catholics cannot similarly join their protestant fellow-citizens. Protestants are more or less divided between themselves on certain matters of doctrine, and on some formal precepts of a dogmatic character; but a very large number of general principles and a considerable amount of doctrinal tenets of christianity are held in common by all of them. If they differ on certain particular points, they agree on a great many things. In school matters they practically entertain the same views and find no difficulty in uniting together. But the differences between the Roman catholics and the various denominations of protestants are wide and substantial, and include most essential points of dogma and discipline. It is not an uncommon thing, in this country at least, to see protestant ministers of different denominations exchange pulpits on certain occasions. No one would even think of seeing the same thing done between a protestant.

minister and a Roman catholic priest. The same characteristic differences are held by catholics to exist on the school question. While some protestants may not be able to see why catholics should have conscientious objections to send their children to public schools taught by protestant teachers, catholics have actually such conscientious objections, and hold that they are insuperable. A man's conscience is a thing of such a personal and idiosyncratic character that it cannot be measured by the particular feelings and dictations of any other man's conscience.

The state may hold that ignorance is an evil to be remedied by public instruction and may see that certain secular subjects, which are known to form the basis of a proper education, be taught in schools, assisted by public money. But in a community composed of different elements, the state should not ignore the particular condition, wants and just claims of an important class of citizens, especially when such important class are in every respect loyal and law-abiding subjects, and there is nothing in their wants and claims clashing with the rights of other classes, or contrary to or conflicting with, the letter, the spirit or the true principles of the constitution. The liberty of conscience is one of the fundamental principles of our constitution. What the Roman catholics ask in claiming the right to maintain their denominational schools is only the carrying out, to the full extent, of that fundamental principle. The desirability of having religious instruction combined with secular teaching in schools is, as stated by my brother Killam, considered as of the utmost importance by very many protestants as well as by Roman catholics.

I may, on this point, take some brief references from a very important public document—the final report of the commissioners appointed to enquire into the elementary schools act, England and Wales. The commission was issued by her majesty the Queen on the 15th January, 1886, to twenty-four distinguished men of England, chosen for their learning, their ability and their high social position, the very large proportion of whom were protestants of various denominations. The enquiry was very extensive, and lasted until June, 1888, when the final report was made, and afterwards presented by command of her majesty to both houses of parliament.

At page 112 of their said report, the commissioners say. "Upon the importance of giving religious as well as moral instruction, as part of the teaching in day public elementary schools, much evidence was brought before us." And at page 113: "All the evidence is practically unanimous as to the desire of the parents for the religious and moral training of their children."

At page 124, "We are convinced that if the state were to secularize elementary education, it would be in violation of the wishes of the parents, whose views on such a matter are, we think, entitled to the first consideration. Many children would have no other opportunity of being taught the elementary doctrines of christianity, as they do not attend sunday schools, and their parents, in the opinion of a number of witnesses, are quite unable to teach them."

Such were the views of the commissioners as to the religious teaching in schools.

As to the conscience question, the commissioners say, at p. 121: "While we are most anxious that conscientious objections of parents to religious teachings and observances in the case of children, should be most strictly respected, and that no child should, under any circumstances, receive any such training contrary to a parent's wishes, we feel bound to state that a parent's conscientious feelings may be equally injured, and should be equally respected and provided for, in the case where he is compelled by law to send his child for all his school time to a school where he can receive no religious teaching."

At page 127, "After hearing the arguments for a wholly secular education we have come to the following conclusions: * * * * (4.) That inasmuch as parents are compelled to send their children to schools, it is just and desirable that, as far as possible they should be enabled to send them to a school suitable to their religious connections or preferences." The same thing is repeated as the 69th of their concluding recommendations at page 213 of the report.

An argument has been advanced, in this country and elsewhere, that state aid given to schools where religious teaching is carried on, would be an endowment to religious

education, which the state should not undertake to do. Such, however, is not the opinion of the commissioners; the report says, at page 119: "We cannot concur in the view that the state may be constructively regarded as endowing religious education when, under these conditions, it pays annual grants for secular education in aid of voluntary local effort to schools in which religious instruction forms part of the programme."

As to the religious teaching in schools, the opinion of five of the commissioners who made a special report is thus expressed at page 244: "We recognize that for the great mass of the people of this country, religious and moral teaching are most intimately connected and that in our judgment the effectiveness of the latter depends to a very large extent upon religious sanctions. We think that the present liberty of religious teaching recognized by law for local managers, is an ample security, that so long as the prevalent opinion of the country remains unchanged, the education of the children and the formation of their character will be based upon those principles which are dear to the mass of the people"

The above quotations show that the views of the Roman catholics of this country on religious teaching in schools are not much different from those entertained by the mass, as well as by the cultured portion of the people of England, protestants as well as Roman catholics

On the grounds hereinbefore mentioned, and on the authorities cited, I believe that the re-enactment in the Manitoba act of the main provisions of the 93rd section of the British North America act, was for the purpose of insuring, under the constitution of the new province, to any class of persons who might desire it, the maintenance of the denominational schools existing at the time of the union; that the words "or practice," added to the first sub-section of the 22nd section of the Manitoba act, can have no other meaning, and should receive no other construction than that they were clearly intended by the legislature to give a legal status to the said denominational schools, which, as a matter of fact, were known to exist at the time, though not recognized by any law; that the said interpretation should be adopted on the ground, amongst others, that if the Roman catholics are allowed to have their denominational schools maintained under the law, no injustice or detriment whatever will result to the other classes of the population, whilst otherwise, by being obliged to establish and support schools to which they could conscientiously send their children, and paying at the same time for schools from which they cannot and will not derive any benefit, the Roman catholics will suffer a very great injustice, and the legislature, by inserting the words "or practice," intended to provide, and in fact did provide against such injustice being done to the catholic minority in this province.

I am, therefore, led to the conclusion that the public schools act of last session, by which the denominational schools, heretofore existing, are legislated out of legal existence, prejudicially affects the privilege which the Roman catholics had by practice at the time of the union with respect to denominational schools, that, in consequence the said public school act is *ultra vires* of the provincial legislature, and that the two by-laws in question passed in compliance with the provisions of the said act, are illegal and should be quashed

In my opinion, the order of my brother Killam should be reversed, and the summons made absolute, with costs.

BAIN, J.

This is an application to reverse an order made by Killam, J., dismissing an application made under section 258 of the municipal act, to quash the by-laws of the city of Winnipeg, numbered 480 and 483, authorising an assessment for city and school purposes in the city for the current municipal year. These by-laws enact that a rate or tax of two cents on the dollar shall be levied and collected on the whole assessed value of the real and personal property in the city, of which rate 4½ mills on the dollar is to be for school expenditure, and the balance for interest on debentures and ordinary municipal expenditure. The application to quash the by-laws is made on the ground

that they are illegal, "because by the said by-laws the amounts to be levied for school purposes for protestant and Roman catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum." It is not questioned that the public schools act, 53 Vic,. c. 31, M. 1890, authorizes the assessment or levy that the by-laws provide for, but is contended that the act itself, providing as it does for the establishment of a provincial system of free and non-sectarian public schools, for the support of which all taxable property is made liable to be assessed and taxed, is *ultra vires* of the provincial legislature, and that the previous school act, which the act assumed to repeal, is still in force, and that under it the taxes for the support of protestant and Roman catholic schools must be levied separately on the property of protestants and Roman catholics respectively.

Under the school acts in force in the province previous to the passing of the public schools act of 1890, there were two distinct sets of public or common schools, the one set protestant and the other Roman catholic. The board of education, which had the general management and control of the public schools, was divided into two sections, one composed of all the protestant members, and one of the Roman catholic members, and each section had its own superintendent. The school districts were designated "protestant" or "Roman catholic," as the case might be; the protestant schools were under the immediate control of trustees elected by the protestant rate-payers of the district, and the catholic schools, in the same way, were under the control of trustees elected by the Roman catholic rate-payers; and it was provided that the rate-payers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination, and that in no case should a protestant rate-payer be obliged to pay for a Roman catholic school, or a catholic ratepayer for a protestant school.

The public schools act of 1890 repealed all former school acts, and established in place of the two sets of schools that had existed under these acts, a system of free and non-sectarian public schools, for the support of which all taxable property is liable to be taxed. It is under the authority that this act gives, that the by-laws in question were enacted; and the question that arises in the application to quash them is the exceedingly grave and important one, whether or not the legislature, in passing this act, has exceeded the powers and jurisdiction conferred upon it by the constitution of the province.

The power of the provincial legislature to make laws concerning education is derived from section 22 of 33 Vic., c. 3, D., usually known as the Manitoba act. By section 2 of this act, the provisions of the British North America act, 1867, except those of them that specially applied to or affected only individual provinces, and except so far also as they were varied by the Manitoba act, were made applicable to the new province, as if it had been one of the provinces that were originally united to form the dominion. By section 93 of the British North America act it is provided that "In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions. (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law in the province at the union." Then a sub-section applies to the province of Quebec only, and extends to the dissentient schools in that province, whether protestant or catholic, all the powers and privileges that at the union the law of Upper Canada conferred on the separate schools there, and the third sub-section provides that, "Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the governor-general-in-council from any act or decision of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education." A fourth sub-section provides that the parliament of Canada may make remedial laws for the due execution of the provisions of the section and of any decision of the governor-general-in-council under it.

The 22nd section of the Manitoba act provides that "In and for the province the said legislature may exclusively make laws in relation to education, subject and

according to the following provisions: (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union. (2) An appeal shall lie to the governor general in council from any act or decision of the legislature of the province, or of any provincial authority affecting any right or privilege of the protestant or Roman catholic minority of the queen's subjects in relation to education," and a third sub-section is in the same terms as sub-section 4 of the 93rd section of the British North America act. This section of the Manitoba act was evidently intended to deal with and to cover the whole subject of education in the province; and I agree with my brother Killam that the powers conferred by this section cannot be either enlarged or restricted by anything that is in the 93rd section of the British North America act, and that the provisions of the 93rd section are material in this case, only in so far as they will assist us to arrive at the proper construction of the section of the Manitoba act. It is evident that the section in the Manitoba act was based on the 93rd section. But there are important differences, evidently made with some more or less definite intention; and a comparison of the two enactments can hardly fail to assist us in seeking to arrive at the intention expressed in section 22.

The general power of the legislature to make laws in relation to education is subject then to the restriction that "nothing in any such law shall prejudicially affect any right or privilege in respect to denominational schools, which any class of persons have by law or practice at the union." This sub-section differs from the 1st sub-section of section 93, in the British North America act, only by the addition of the words "or practice;" and as, prior to the union, there were no laws in force in the territory, which now forms the province, on the subject of education or schools, denominational or otherwise, the reason of the insertion of the words "or practice" is obvious.

The contention of the applicant is that Roman catholics, as "a class of persons," had, by practice, prior to the union, certain rights and privileges with respect to denominational schools; and that the public schools act, by establishing a system of free and public schools, and by making all assessable property of Roman catholics, as well as of all others, liable to be taxed for the support of these schools, prejudicially affects these rights, and that, therefore, the act is *ultra vires* and invalid, and that the school act and the school system it purports to repeal and abolish, are still in force. These rights and privileges, that it is claimed Roman catholics had before the union, by practice, are formulated by the learned counsel for the applicant to be, first, the right to be separate from the rest of the community with reference to education; second, the right to compete on equal terms with other schools; and third, the immunity from contributing to the support of any other schools than their own; and this last is claimed to be rather in the nature of a privilege than a right.

The reason why parliament made use of the expression a "right or privilege in practice," is more obvious, perhaps, than the precise meaning that should be given to the expression it has used. On the argument, no careful attention was given by any of the learned counsel to the consideration of the meaning of these somewhat vague and indefinite words, but in examining the question raised by the application, it is necessary to fix, as far as possible, and have in mind what is meant by the words, in order to determine if the evidence shows that Roman catholics, as a "class of persons," had the rights and privileges claimed, or any other rights and privileges, in practice, with respect to denominational schools; and if it appears that they had, then it will be further necessary to inquire if they have been prejudicially affected by the act in question.

In his affidavit, filed in support of the application, his grace the archbishop of St. Boniface, states that, prior to the passage of the Manitoba act, there existed in the territory now constituting the province of Manitoba, a number of effective schools for children. These schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, and others by various protestant denominations. The means necessary for the support of the Roman catholic schools were supplied to some extent by fees paid by some of the children who attended the schools, and the rest was paid out of the funds of the church, contributed by its members. During

the period referred to, Roman catholics had no interest in or control over the schools of the protestant denominations, and the members of the protestant denominations had no interest in or control over the schools of the Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic church supplied the schools of their own church for the benefit of Roman catholic children, and were not under obligation to, and did not contribute to the support of any other schools. His grace adds: "In the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth"

The affidavits of Alex. Polson and John Sutherland, filed in reply, merely supplement his grace's affidavit by stating "that schools which existed prior to the province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control, nor did they in any way receive public support. No school taxes were collected by any authority, prior to the province entering confederation, and there were no means by which any person could be forced by law to support any of said private schools." The affidavits do not show how these schools were established; whether the Roman catholic and the various protestant denominations, as churches, established the schools and appointed teachers and directly controlled them or whether they were established by individuals as private enterprises, and were conducted in accordance with the religious views of the denomination to which the individual proprietors belonged and to which they looked for support. However, it is stated that the schools were denominational ones, and that some of them were controlled by the Roman catholic church and the others by various protestant denominations. On these facts then, what "rights or privileges in practice" are Roman catholics shown to have had in respect to their schools?

I find myself unable to see how it can be said that they had any *privilege* in respect of their denominational schools, in any strict, or even popular, sense of the word "privilege." It is not shown, or claimed, that they enjoyed any benefit or advantage in respect of their schools that the various other classes of persons who had established schools did not likewise enjoy in respect of theirs, or that any other individual might not have enjoyed had he chosen to open a school. They were under no obligation, indeed, to contribute to the support of the schools of the other denominations, nor for that matter, to contribute to the support of their own schools, but in this respect all other classes of persons, and individuals as well, were precisely in the same position and enjoyed the same immunity; and that which is the common immunity and in the common and equal enjoyment of all cannot properly be said to be a "privilege" of any one person or class.

I may say here that I entirely agree with my brother Killam in holding that the schools that are established by the public schools act are not "denominational" schools. The advisory board is given power to prescribe forms of religious exercises to be used in the schools, but no pupil is required to attend these exercises against the wish of his parents or guardian. The 8th section of the act expressly provides that the schools shall be entirely non-sectarian, and that no religious exercises shall be allowed in them except that prescribed by the advisory board; and we must assume that the board will prescribe forms of religious exercises that shall be entirely non-sectarian. It is a matter of public knowledge that some of the leading and most representative men of some of the protestant denominations object to these schools, and, as his grace says in the affidavit, "would like education to be of a more distinctly religious character than that provided for by the said act." I quite admit, however, that the objection on the ground of the absence of an education that is distinctly religious will be felt much less by protestants than by Roman catholics, but I cannot hold that the non-sectarian religious exercises that the act authorizes, or even that the absence of all religious exercises or teaching in the schools makes, or would make, them protestant or denominational schools.

It is to be observed, too, that in this sub-section 1, parliament was not thinking only of the two great divisions of Roman catholics and protestants, but had in mind

and intended to preserve the rights and privileges that other classes of persons besides catholics or protestants had, or might have, in respect of denominational schools. This was expressly so held as regards the corresponding sub-section in the 93rd section of the British North America act in *Exparte Renaud* 1 Pugs. N.B.R, 273, usually known as the New Brunswick school case; and, as the present learned chief justice of the supreme court said in that case, "We think that the term 'denomination' or 'denominational,' as generally used, is in its popular sense more frequently applied to the different denominations of protestants than to the church of Rome; and that the most reasonable inference is that sub-section 1 was intended to mean just what it expresses, viz.: that 'any,' that is, every 'class of persons' having any right or privilege in respect to denominational schools, whether such class should be one of the numerous denominations of protestants or Roman catholics, should be protected in such rights." For an example of the use of the word "denomination" in the sense ascribed to it by the chief justice, we have only to turn to paragraph 3 of the affidavit of his grace the archbishop, where he speaks of some of the schools having been "controlled by the Roman catholic church and others by various protestant denominations."

A recent learned writer on jurisprudence (*Holland, Elements of Jurisprudence*, 4th Ed., 70) has defined a "legal right," as "a capacity residing in one man of controlling with the assistance of the state, the action of others." But from the circumstances of the case, as well as from the addition of the words "by practice" to the sub-section as it is in the British North America act, it is evident, I think, that parliament intended that the sub-section in the Manitoba act should apply to other rights than legal ones. At page 69, the author, whose definition of a "legal right" I have given, says: "When a man is said to have a right to do anything, or over anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular manner, with approbation, or, at least, with acquiescence, but would reprobate the conduct of anyone who should prevent him from doing the act, or making use of the thing, or should fail to treat him in that particular way. A "right" is thus the name given to the advantage a man has when he is so circumstanced that a general feeling of approval, or at least of acquiescence, results when he does or abstains from doing certain acts, and when other people act or forbear to act in accordance with his wishes, while a general feeling of disapproval results when anyone prevents him from so doing or abstaining at his pleasure, or refuses to act in accordance with his wishes." A "right" in this sense is nothing more than a "moral right," and Professor Holland so terms it and distinguishes it from a "legal right." In the case of *Fearon* v. *Mitchell*, L. R. 7 Q.B., 690, to which the chief justice has called my attention, the court, in construing a section that provided that no market should be established "so as to interfere with any rights, powers or privileges enjoyed within the district by any person, without his consent," held that the word "rights," especially when taken in conjunction with the words "powers or privileges," must mean rights acquired adversely to the rest of the world, and peculiar to the individual, and did not apply to a right which an individual enjoyed in common with the rest of her majesty's subjects. Had the words "right or privilege" stood alone in the sub-section, this is doubtless the only meaning that could have been properly given to them, but from the addition of the words "by practice," and from the state of circumstances in reference to which parliament was legislating, I am disposed to think the words were used in their widest signification, and that the "rights" that parliament had in view were in the nature of those that Professor Holland describes as "moral rights.' What was meant, then, by the sub-section was, I think, that nothing in any law to be passed by the legislature relating to education was to prejudicially affect anything that any class of persons had been in fact, and generally in the habit of doing with respect to denominational schools, with the acquiescence, implied or expressed, of the rest of the community. A view of the meaning of the sub-section more favourable to the contention of the applicant cannot possibly be taken.

The affidavits show that before the union, private schools regulated and controlled by the Roman catholic church, had been established and maintained. These schools are

properly termed denominational schools, and they were it is to be inferred, established and maintained with the acquiescence of the rest of the community. If then I am not giving too wide a meaning to the term "right or practice," it must be held that it has been established that Roman catholics had the right to establish and maintain denominational schools, and, of course, to attend them, or send their children to them, if they saw fit.

From the fact that there were these denominational schools, and that they were all conducted according to the distinctive views and beliefs of Roman catholics, Roman catholic parents would naturally send their children to these schools rather than to those which were conducted by the various protestant denominations, which also, we may assume, were conducted according to the distinctive religious views of the denominations that controlled them, and the deduction of his grace the archbishop, is doubtless entirely correct when he says in the 6th paragraph of his affidavit, that, "in the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom and practice, separate from the rest of the community." But this, it seems to me, falls far short of establishing that Roman catholics had a distinct and positive right to be separate in matters of education; and to say that they were thus more or less separate, is only to say in other words that they had the right to maintain denominational schools and send their children to them, if they saw fit. Their being separate was only an incident of their right to maintain the schools.

The other right that the counsel for the applicant claims that Roman catholics had at the union by practice, was the right to compete on equal terms with protestants in maintaining their denominational schools. All the schools were private enterprises, and all were upon the same footing and competed for the support of the public on equal terms, as far as any influence external to the class of persons who controlled the schools was concerned, and no one will question the correctness of the proposition advanced. The different schools had the right to compete with one another on equal terms, just as we might say that a merchant or tradesman has the right to compete with other merchants or tradesmen on equal terms. But this proposition seems to have been advanced with the idea that the schools established under the public schools act are denominational or protestant schools; and on this point I have already expressed my opinion.

It will be admitted that it is the imperative duty of every state or civil government to provide means by which, at all events, elementary and ordinary education shall be placed within the reach of every child in the community. It is recognized that it is a danger to the state that any portion of its citizens should grow up in ignorance, and that a state is justified in imposing taxation to provide means by which this danger will be prevented or lessened. Under the constitution of this province, the power to make laws in relation to education has been given exclusively to the provincial legislature. To it has also been given the power to impose taxation for provincial purposes; and in giving these powers, parliament clearly contemplated and intended that some system of public instruction and education would be provided by the legislature, and that, as far as should be found necessary, taxation would be imposed to provide and support such a system. The power of the legislature to make laws in relation to education was made subject only to one qualification or restriction, that nothing in such laws should prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union. The legislature has by the act in question provided for the establishment of a system of public, free and non-sectarian or undenominational schools, at which every child in the province can attend, and has made all taxable property in the province liable to be taxed for the support of these schools. No one, however, can be compelled to attend these schools if he does not wish to, and there is nothing in the act that will in any way prevent any person, or class of persons, from establishing schools that shall be strictly denominational, and from competing on equal terms with other denominational schools that may be established. The rights then that Roman catholics had before the union to establish denominational schools and to attend them, and to compete, as regards their

schools, on equal terms with other denominations, or protestants generally, has not been taken away, and can be exercised now as fully as it could have been before the union. The attendance at these schools, it is true, may be prejudicially affected by the competition of the free public schools established under the act, in the same way that the business of a merchant, who has a right to carry on business, may be affected by another merchant opening a store in the exercise of a similar right, but the right itself is as little affected in the one case as the other. Nor do I think these rights in respect of denominational schools or any other right or privilege that on the evidence could possibly be claimed, can be said to be prejudicially affected by the fact that the property of Roman catholics, in common with the property of everyone else, is made liable to be taxed in support of the public, undenominational schools that the act establishes. No right in respect to such schools is affected by this taxation ; the taxation to support these public schools is for a provincial purpose, and if Roman catholics, as is said, are less able to support their denominational schools by whatever amount of taxes they have to pay to the public schools, the same may be said of any other tax that is imposed by the legislature for provincial or municipal purposes. On the question of what is meant by the expression, "prejudicially affect any right," the judgment of the court in the New Brunswick school case, in which the court had to consider the effect of these words in the section of the British North America act, is instructive.

The parish schools act of New Brunswick, which was in force in that province when the province entered confederation, secured to all children whose parents did not object, the reading of the bible in the parish schools, and expressly provided that the bible, when read in the parish schools by Roman catholic children, should, if required by parents, be the Douay version, without note or comment. But the common schools act, 1871, which repealed the parish schools act, omitted this provision and declared that all schools conducted under its provision should be non-sectarian, and the board of education, under the powers given to it by the act, made the regulation that "it shall be the privilege of every teacher to open and close the school by reading a portion of scripture (out of the common or Douay version, as he may prefer), and by offering the Lord's prayer." It is evident therefore, that Roman catholics were thus placed in a very different position as regards the actual enjoyment of the right or privilege they had to insist that the Douay version should be read to their children, from that they were in before the passing of the common schools act, but the court held, that if this were a right or privilege in respect of denominational schools within the meaning of the sub-section, it was not taken away, although it was not protected by any express enactment, and that, therefore, the right could not be said to have been prejudicially affected so as to make the act invalid.

But, it is said, Roman catholics do not claim that the effect of the sub-section is to render them and their property for ever exempt from taxation for the support of public schools, and they admit that they are liable and willing to be taxed for the support of Roman catholic public schools as they were under the school system that the present act has abolished, and the principal part of the persuasive argument of the counsel for the applicant was devoted to an endeavour to show that having regard to the history of the controversy with respect to denominational schools in the older provinces, parliament could have intended nothing else by the provisions of section 22 than to confirm to Roman catholics in Manitoba the same rights and privileges in regard to separate schools that had been won for the minority in Upper Canada, and that were not only confirmed to Ontario, but were extended to Quebec, by the second sub-section of the 93rd section of the British North America act, and that the court should give effect to what we must thus assume, was the intention and policy of parliament. It is urged, too, that if sub-section 1 is to have no more effect than to preserve the right to maintain denominational schools, it is useless and inoperative, and that parliament would never have thought it worth while to make an enactment merely to preserve this right, as it cannot be supposed that any legislature would ever think of taking it away. It is satisfactory to find under the circumstances, that there is still this confidence on the part of the applicant in the fairness and liberality of those who may from time to time form the

majority of the legislature, but admitting that his confidence is well founded, and that the sub-section will never be required to preserve the right in question, it does not follow that it must be given the wider operation contended for.

It is, of course, necessary for anyone who is interpreting and construing a statute to make himself acquainted, as far as he can, with the history of the enactment and the external circumstances which led to its being passed, so that he may be so far in the place of those whose words he is interpreting that he can see what the words they used relate to. But "the external circumstances which may thus be referred to do not, however, justify a departure from every meaning of the language of the act. Their function is limited to suggesting a key to the true sense when the words are fairly open to more than one; and they are to be borne in mind with the view of applying the language to what was intended and of not extending it to what was not intended." (*Maxwell* on *Statutes*, p. 32.) And as Sir William Ritchie said in *Exparte Renaud*, "It is a well established canon of construction that an act is to be construed according to the ordinary and grammatical sense of its language, if precise and unambiguous; and it is likewise a rule, established by the highest appellate authority, that the language of a statute, taken in its plain, ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments." The question for a court always is, not what parliament meant, but what its language means.

But looking at the history of the controversy in regard to separate schools, and at all the external circumstances that we are asked to consider, it is very far from clear to my mind that parliament meant anything more by the provisions of section 22 than the language that it used naturally expresses. It will occur to everyone that, had it been the intention to give and confirm to Roman catholics, or any other class of persons in the new province, the right to have separate schools, and the immunity from supporting any but their own schools, the right would have been given in explicit terms. It was well known what agitation and bitter ill-feeling the question had caused in Upper Canada before it was settled; and if parliament had intended to settle it once for all for Manitoba, I find it impossible to think that, with the provisions of the British North America act that settled it for Ontario and Quebec before them, and from which section 22 was adapted, it would not have inserted a similar express provision in the Manitoba act. But it has not done so, and the inference I would draw from these external circumstances, as well as from the language of the section, is that parliament intended to leave the question to be settled by the people of the province themselves, as it had been by the people of the provinces in which a settlement had been arrived at, making only the natural and just restriction that existing rights in respect of denominational schools should not be prejudicially affected by any laws that the legislature should make. As we have seen, "various protestant denominations" were exactly in the same position as regards denominational schools as Roman catholics were, and if Roman catholics can claim the right to have separate schools and to support only their own schools, so can each one of these protestant denominations. But in the absence of any express and explicit enactment to this effect, it is hard to believe that it could have been the intention or policy of parliament to impose such a state of affairs upon the new province.

The act of the legislature that we are asked to hold to be unconstitutional and invalid is one that deals with a subject over which the legislature, by the constitution of the province, has been given exclusive jurisdiction, subject only, as far as the courts are concerned, to the one restriction or limitation that the laws to be made by the legislature shall not prejudicially affect these rights in respect of denominational schools. With the policy of the legislature, the court has nothing to do, and in dealing with such cases, the presumption of the court should always be, I think, in favour of the constitutionality of the act in question; and in this case the court should not undertake to declare the act invalid unless it is established beyond reasonable doubt that the legislature has exceeded its jurisdiction by contravening and infringing upon this restriction or qualification. The rule that I have indicated is the one that is followed in the supreme court of the United States, and on this subject I cannot do better than

adopt the language of Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch, 128, "The question," he says, "whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obliga- which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a strong and clear conviction of their incompatibility with each other."

I think my brother Killam was right in dismissing the application to quash the by-laws, and I agree with the chief justice that this application should be dismissed with costs.

In the Queen's Bench.

In the matter of an application to quash by-law 480 and 483 of the city of Winnipeg.

Upon the application of John Kelly Barrett, a resident ratepayer of the city of Winnipeg, by the way of appeal from the order or decision of Mr. Justice Killam, pronounced herein on the twenty-fourth day of November last past, dismissing with costs the summons granted herein on the seventh day of October last past, to quash the by-laws above referred to, upon hearing read the said summons, and the affidavits and papers filed, and upon hearing counsel on behalf of the applicant and of the said the city of Winnipeg.

It is ordered that the said appeal be and the same is hereby dismissed, and the said order pronounced herein, and dated the twenty-fourth day of November last past, be affirmed, with costs of this appeal to be paid by the said applicant to the said the city of Winnipeg forthwith after taxation thereof by the master.

Dated the 2nd day of February, A.D. 1891.

By the court.

G. H. WALKER,
Prothonotary.

In the Queen's Bench.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

Upon the application of John Kelly Barrett, the plaintiff herein, and upon reading the consent of the defendants, the city of Winnipeg, and a bond for security for the costs of the plaintiff's appeal to the supreme court of Canada, and other papers filed herein by the said plaintiff, I do order that the said bond be and the same is, hereby approved, and that the appeal of the above named John Kelly Barrett in this cause from the judgment of this court *in banc* pronounced herein on the second day of February, A.D. 1891, to the supreme court of Canada be, and the same is hereby allowed.

And I do further order that execution herein be staid, pending the said appeal to the supreme court of Canada.

Dated at chambers, this seventh day of March, A.D. 1891.

T. W. TAYLOR, C. J.